Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF SANTA ANA, JOHN QUIJAS, ANGELO BLASCOVICH, and MICHAEL GONZALEZ,

Petitioners,

v.

ROBBIE VIEHMEYER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Rule 16(b) of the Federal Rules of Civil Procedure states that the district court shall "enter a scheduling order that limits the time . . . to join other parties and to amend the pleadings . . . " and that "a schedule shall not be modified except upon a showing of good cause and by leave of the district judge." Respondent admittedly failed to name additional defendants within the time set by the scheduling order even though he possessed documents identifying these potential defendants, and likewise conducted no discovery until the deadline passed. Did the Court of Appeals err in ruling that Rule 16(b) did not apply to actions brought under 42 U.S.C. Section 1983?

2. Given the predicates set forth in question 1 above, did the Court of Appeals err in borrowing state laws governing "doe" amendments as part of the borrowing of state statutes of limitation where, under *Wilson v. Garcia*, 471 U.S. 261 (1985), federal courts are to borrow only where there is no applicable federal law?

3. Given the predicates set forth in question 1 above, did the Court of Appeals apply the wrong standard of review in reversing the district court's ruling finding there was no good cause to allow a late amendment?

LIST OF PARTIES

Plaintiff and Respondent: Robbie Viehmeyer.

Defendants and Petitioners: City of Santa Ana, John Quijas, Angelo Blascovich, and Michael Gonzalez.

Defendants: Kevin Graham, Ronald Castillo, Jeff Launi, Isidro Galguera, Michael Kuplast, Arthur Morales, Paul Walters, David Reaver, and Adlerhorst International, Inc.

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PETITION FOR WRIT OF CERTIORARI

The City of Santa Ana, John Quijas, Angelo Blascovich, and Michael Gonzalez respectfully request this court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court denied respondent's pretrial motion for leave to add doe defendants in an unpublished order, which is reprinted in the Appendix at App. 8-15.

The Ninth Circuit's memorandum opinion, which (among other things) reversed the district court's order identified above, is unpublished and is reprinted at App. 1-7.

On July 30, 2003, the Ninth Circuit filed an unpublished order denying defendants' petition for rehearing and rehearing en banc. The order is reprinted at App. 16-17.

JURISDICTION

This court has jurisdiction under 28 U.S.C. Section 1254(1). This petition has been filed within 90 days of the denial of defendants' petition for rehearing, which (as mentioned above) occurred on July 30, 2003.

STATUTORY PROVISIONS INVOLVED

Title 42 of the United States Code, Section 1983, is reprinted in the appendix at App. 18. The relevant portions of Rules 15, 16, and 26 of the Federal Rules of Civil Procedure are reprinted in the appendix at App. 15-22. The relevant portions of California Code of Civil Procedure Sections 474 and 583.210, as well as California Government Code Section 68616, are reprinted in the appendix at App. 22-23.

INTRODUCTION

Respondent Robbie Viehmeyer sued the City of Santa Ana, its police chief, and certain of its officers in January 2001 for excessive force in connection with his arrest. (See 42 U.S.C. § 1983.) He did not name three officers (petitioners Quijas, Blascovich, and Gonzalez) as defendants even though: (1) he had reports that identified the three officers as being involved in his arrest; and (2) the City's Rule 26 disclosures listed these three officers as witnesses and listed other police reports that identified one of the "doe" defendants as the dog handler and the two others as involved officers.

In connection with a joint Rule 26 report (made in June), the parties agreed that any additional parties would be added at the latest by September 2001. Viehmeyer did not follow up on the information in his possession regarding the three officers and did not conduct discovery until after the deadline for adding parties had passed.

In January, 2002, four months after the scheduling order's deadline for adding parties, Viehmeyer attempted to add petitioners Quijas, Blascovich, and Gonzalez by "doe" amendment in violation of the scheduling order. The district court found that Viehmeyer did not demonstrate good cause for the failure to act timely and ordered the doe amendments stricken.

In its memorandum decision, the Ninth Circuit reversed that order. In a confusing opinion, the Ninth Circuit held either that (1) Rule 16(b) of the Federal Rules of Civil Procedure does not apply to actions brought under 42 U.S.C. Section 1983, or (2) the district court's decision finding no good cause for a late amendment was reversible under (apparently) a *de novo* standard of review. Under either of these "holdings," a circuit split has been created. In order to clarify a district court's authority to enter a scheduling order under Rule 16(b), this petition should be granted.

STATEMENT OF THE CASE

A. Viehmeyer's Complaint.

Viehmeyer filed a complaint in January 2001 alleging a single cause of action for "excessive force" against the City of Santa Ana, its police chief, and a number of police officers (but not petitioners Quijas, Blascovich, and Gonzalez). App. 24. Viehmeyer alleged that defendants participated in or condoned the improper release of a police service dog on him while he was attempting to avoid arrest. Viehmeyer sought damages under 42 U.S.C. Section 1983. App. 30, 32.

B. Viehmeyer Has Information Identifying the Three Individual Petitioners But Does Not Attempt to Add Them as "Doe" Defendants Before the Scheduling Order Deadline Expires.

The district court entered a scheduling order on June 25, 2001, that included a deadline for joining parties and amending pleadings. Under the scheduling order, any motions to join parties or for leave to amend were required to be filed within 60 days (August 24) and heard within 90 days (September 23). App. 10.

As set forth in their joint Rule 26(f) report (filed June 15, 2001), the parties were aware that Viehmeyer might attempt to amend his complaint to add new defendants: "Depending upon what is revealed in discovery, in particular the production of the Santa Ana police department internal investigation into plaintiff's incident, plaintiff may be naming additional persons as doe defendants. It has been agreed between the parties that additional parties may be added up to and including September 1, 2001." App. 44.

A few days after filing the joint Rule 26(f) report, the Santa Ana defendants sent their disclosure of witnesses and documents to Viehmeyer under Rule 26(a). App. 34-38. Viehmeyer suggested (and the parties agreed) that they would exchange copies only if documents described in the Rule 26(f) reports that were specifically requested, rather than all documents listed. App. 83.[1] Quijas, Blascovich, and Gonzalez were all listed as witnesses. App. 35. Among the documents described in the Rule 26(f) report were the following, which identified all three petitioners:

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[1] Viehmeyer's counsel later claimed that the parties had agreed to produce police reports *sua sponte*. App. 97.

- "Monthly and Weekly Training Logs re *Ofcr. Quijas and K-9 Hary* [the dog involved in the incident]."
- "Santa Ana Police Dept., Supplemental Report, . . . arrestee: Viehmeyer, *reporting officer: Blascovich.*"
- "Santa Ana Police K-9 Unit Memo . . . re canine use of force 99-15203, *officer involved: Johnny Quijas*, K-9 involved: Hary, arrestee: Viehmeyer."
- "Confidential Santa Ana Police K-9 Unit Memo to Sgt. Doyle Smith from *Ofcr. J. Quijas* re canine arrest. . . . "
- "Santa Ana Police Dept. Supplemental Report, . . . re arrestee: Viehmeyer, *reporting officer: Gonzalez.*" (Italics added.) App. 36-38.

Although Viehmeyer received the City's disclosure statement in June, Viehmeyer did not ask for any of these reports. Further, he did not notice a single deposition (even of the then party defendants, let alone of Blascovich, Quijas or Gonzalez); nor did he serve written discovery of any kind prior to expiration of the amendment period set forth in the scheduling order. He made no attempts to discover or determine the identity of the officers involved in his arrest during that period. The September deadlines came and went without Viehmeyer naming any new defendants.

C. Viehmeyer Belatedly Attempts to Name Petitioners as Doe Defendants, But the District Court Denies His Request.

In January 2002, almost four months after the scheduling order deadline expired, Viehmeyer filed notices of substitution of three "doe" defendants for Officers Quijas,

Blascovich, and Gonzalez. App. 56-58. On defendants' motion, the district court struck Viehmeyer's "doe" amendments as untimely. The district court explained that Viehmeyer's notice of substitution was untimely and unsupported by a showing of good cause:

> "A review of the prior proceedings demonstrates that Plaintiff was not diligent in seeking amendment of his complaint. He was placed on notice in June of 2001, even before the scheduling conference, that Defendants possessed reports linking the Doe Defendants to Plaintiff's arrest. . . .
>
> "By Plaintiff's own admission, he has been in possession of a police report for months that lists a number of officers, including the Doe Defendants, as having information and/or being involved in the arrest. Plaintiff failed to depose any of these officers or submit interrogatories or other discovery requests to clarify and expand upon this information." App. 11, 13-14.[2]

Viehmeyer contended that the City prevented him from adding additional defendants because it did not produce the documents listed on its pretrial disclosure statement prior to the September deadline. The court rejected that contention:

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[2] After his motion for leave to add doe defendants was denied, Viehmeyer filed a separate action solely against petitioners Quijas, Blascovich, and Gonzalez. The district court dismissed that action and Viehmeyer appealed. The Ninth Circuit ruled that this second appeal (Ninth Cir. No. 02-55781) was moot in light of its disposition of the "main" appeal involved here.

"Plaintiff now suggests that Defendants should have drawn particular documents to Plaintiff's attention. However, Defendants argue, and it appears Plaintiff does not refute, that the parties were operating under an agreement whereby they would request the particular documents that they wanted produced from the disclosure list. In fact, Plaintiff's Rule 26(a) disclosures contains a reiteration of the agreement . . . [and] Plaintiff did not request any of the Police reports." App. 14.

D. The Ninth Circuit Reverses the District Court in a Memorandum Decision.

On June 16, 2003, the Ninth Circuit reversed the district court's order in conjunction with Viehmeyer's unsuccessful appeal from the summary judgment entered in favor of the other defendants. App. 1-7. The court's rationale is far from clear. The court first summarized Viehmeyer's contentions, including his argument that California substantive law (three years to substitute doe defendants) is "borrowed" in Section 1983 actions. App. 3. But the court then stated:

"Without resolving this legal question, we conclude that under the totality of the circumstances, *including the various impediments that Viehmeyer encountered in determining the officers' identity*, Viehmeyer should have been allowed to substitute the officers in question, Quijas, Gonzalez, and Blascovich as "Doe" defendants. Thus, we reverse the district court's order granting the defendants' motion to strike the Doe amendment." (Italics added and fns. omitted.) App. 3-4.

The Ninth Circuit did not explain the nature of the "various impediments that Viehmeyer encountered." It did not address the district court's finding that Viehmeyer failed to request any of the police reports identified by the City of Santa Ana. Nor did it explain the basis for finding such "impediments" in light of the district court's factual findings that any failure to discover the identity of the doe defendants was caused by plaintiff's own lack of diligence.

E. The Ninth Circuit's Denial of Rehearing.

Petitioners timely requested rehearing or, alternatively, rehearing en banc. On July 30, 2003, the Ninth Circuit denied rehearing without substantive comment. App. 16-17.

REASONS WHY THE PETITION SHOULD BE GRANTED

There are two ways to read the Ninth Circuit's memorandum decision in this case. The Ninth Circuit held either that:

(1) the time within which to name new defendants in a Section 1983 action is governed by state law, not Rule 16 of the Federal Rules of Civil Procedure, and thus no Section 1983 case may be tried in California before the three-year period to add doe amendments has expired; such a holding assumes that California law so provides and that California law – rather than Rule 16 of the Federal Rules of Civil Procedure – controls.

- or -

(2) the district court's factual finding regarding plaintiff's lack of diligence in identifying new defendants is entitled to no deference.

Either way, certiorari is appropriate to resolve a conflict between the circuits.

I

There is a Conflict Among the Circuits as to Whether Deadlines Imposed by a Pretrial Order are Valid in a Section 1983 Action.

Rule 16(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "[T]he district judge . . . shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys . . . , enter a scheduling order that limits the time
>
> > "(1) to join other parties and to amend the pleadings; . . .
> >
> > * * *
>
> "A schedule shall not be modified except upon a showing of good cause and by leave of the district judge. . . . "

In the present case, the Ninth Circuit relied on this Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 280 (1985), in holding that state law governs the time within which to name additional defendants, not Rule 16. No other circuit has interpreted *Wilson* as authorizing district courts to "borrow" any state law other than a statute of limitations in Section 1983 actions.

As *Wilson* holds, the "borrowing rule" applies only where there is *not* a federal rule or statute on point. *Wilson, supra,* 471 U.S. at 266-267 (in the absence of a federal statute of limitations governing a federal cause of action, courts first look to the most analogous state statute of limitations). Here there was a federal rule on point – Rule 16 – and a scheduling order entered consistent with that Rule.[3] Moreover, under *Wilson*, even where federal courts borrow state statutes of limitations, they borrow no more than is necessary. The Ninth Circuit itself has recognized this principle:

> "According to *Wilson* 'only the length of the limitations period, and closely related questions of tolling and application are to be governed by state law' and '[t]he phrase "closely related questions of tolling" is not to be given a broad reading, for, as the [Supreme] Court wrote in *West* [*v. Conrail*, 481 U.S. 35 (1987)], "when it is necessary for us to borrow a statute of limitations, we borrow no more than necessary."'"

Sain v. City of Bend, 309 F.3d 1134, 1137 (9th Cir. 2003); see also 42 U.S.C. § 1988 (state law shall only apply "so far as the same in not inconsistent with" federal law). Thus,

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[3] When Viehmeyer agreed to a cutoff date for adding defendants, he in effect stipulated to dismissing doe defendants once that cutoff passed. Even under California law, a party thereafter would have no right to amend. California Government Code Section 68616, subdivision (h) allows dismissal of doe amendments pursuant to stipulation. See also *McIntire v. Superior Court*, 52 Cal.App.3d 717, 721, 125 Cal.Rptr. 379 (1975) (reversing the trial court's denial of a motion to quash summons on doe defendants, explaining "to justify the addition of new defendants, plaintiffs must have acted with due diligence to bring them in as parties. [Citation] Plaintiffs exhibited no such diligence.").

while federal courts borrow the statute of limitations in civil rights cases, federal law determines when the cause of action accrues. *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002).

Recognizing these principles in both federal question and diversity cases, courts have applied Rule 16's good cause requirements where a party seeks to amend after the time limits imposed by a federal court scheduling order. *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149 (1st Cir. 1992) (leave to amend sought two months after deadline provided for in scheduling order denied in diversity action); *Tschantz v. McCann*, 160 F.R.D. 568 (N.D.Ind. 1995) (federal civil rights action in which plaintiff's motion for leave to file belated amendment was dismissed under Rule 16); *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566-567 (9th Cir. 1994) (a purported amendment in a *Bivens* action that violated the court's scheduling order was properly refused under Rule 16).

The Ninth Circuit's opinion here conflicts with at least two other Ninth Circuit cases. In *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992), plaintiffs, an injured skier and his wife, sued a defendant holding company for negligent operation of a ski resort. The defendants in *Johnson* advised plaintiff in letters and in discovery responses that the resort at which plaintiffs were injured was owned and operated by a separate corporation. The *Johnson* court entered a pretrial scheduling order under Rule 16(b).[4] As in this case, four months

[4] Rule 16(b) of the Federal Rules of Civil Procedure states that the district court shall "enter a scheduling order that limits the time . . . to join other parties and to amend the pleadings. . . . " The same rule

(Continued on following page)

after the pretrial order's amendment deadline had passed, the *Johnson* plaintiffs attempted to add new parties.[5] The Ninth Circuit held that plaintiffs were not entitled to amend because they had not shown the requisite diligence. *Johnson,* 975 F.2d at 609-610 (finding no good cause where plaintiff failed "to heed clear and repeated signals that not all the necessary parties had been named in the complaint" and sought to amend after the deadline).

The Ninth Circuit's memorandum decision also conflicts with *Janicki Logging Co. v. Mateer*, 42 F.3d 561 (9th Cir. 1994). In *Janicki*, plaintiff, a logging company filed a lawsuit against United States Forest Service officials in their individual capacities, claiming that defendants had violated its constitutional rights when they cancelled a portion of plaintiff's logging contract after the discovery of a northern spotted owl's nest in an area of proposed logging operations. On defendants' motion, the district court held the claims proffered by plaintiff to be barred because the plaintiff had not pursued relief as required under the Contracts Disputes Act. Moreover, the district court denied the plaintiff's request to amend the complaint and transfer the amended action to the proper tribunal because the requested amendments were in violation of the court's scheduling order. The Ninth Circuit affirmed that denial, holding "Federal Rule of Civil Procedure 16 is to be taken seriously and that attempts to

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mandates that "a schedule shall not be modified except upon a showing of good cause and by leave of the district judge."

[5] The only difference is that in *Johnson*, the plaintiffs sought leave to amend, whereas in this case Viehmeyer simply filed doe amendments in admitted violation of the pretrial order.

amend complaints, which would require an amendment of the scheduling order, must be based upon good cause." *Janicki*, 42 F.3d at 566.[6]

The Fourth Circuit, however, appears to concur with the Ninth Circuit's memorandum decision here (although the memorandum does not cite it). In *James River-Norwalk, Inc. v. Burch Roofing Co., Inc.*, 15 Fed.R.Serv.3d 996 (4th Cir. 1989), the Fourth Circuit disapproved of a published district court opinion and held that "after a scheduling order has expired, the [good cause] considerations of Rule 16(b) are not relevant to the analysis of a motion for leave to amend pursuant to Rule 15." *Id.*, disapproving *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987).

The above demonstrates that at least three circuits (the 1st, 8th, and a conflicted 9th) hold that – in both diversity and federal question cases – the good cause requirement of Rule 16 controls the question of amending the complaint if a case management order has been entered, not Rule 15, and not state law rules regarding "doe" amendments. At least two circuits (the 4th and – again – a conflicted 9th) hold the opposite. Certiorari is required to resolve this conflict.

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[6] *Janicki* recognizes that Rule 16 controls over the provisions of Rule 15 of the Federal Rules of Civil Procedure. Accord, *Bradford v. DANA Corp.*, 249 F.3d 807 (8th Cir. 2001); *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149 (1st Cir. 1992).

II

There is a Conflict Among the Circuits as to the Proper Standard of Review to be Given Orders Denying Leave to Add Additional Parties Under FRCP 16(b).

The Court of Appeal's memorandum opinion found that, because "Viehmeyer alleges that he was unable to determine the identity of the canine officer who gave the attack orders until after the deadline for amending his pleadings had passed," he should have been given leave to amend. App. 2. Other than identifying this as Viehmeyer's allegation, the memorandum opinion discussed neither the record nor the district court's factual findings that the contention is not supported by the facts.

In holding as it did, the Court of Appeals evidently applied a *de novo* standard of review. It ignored the district court's finding that Viehmeyer's "inability to identify" other potential defendants was the product of his own carelessness and lack of diligence. Viehmeyer was not diligent because he did not ask for records and did not initiate discovery until after the deadline for amendments had passed. The district court had found that Viehmeyer "failed to depose any of these officers or submit interrogatories or other discovery requests to clarify and expand upon this information." App. 14.

The Ninth Circuit's apparent use of a *de novo* standard of review conflicts with the holdings of other circuits, which apply an abuse of discretion standard to orders under Rule 16(b). See, e.g., *In re Milk Prods. Antitrust*

Litig., 195 F.3d 430, 438 (8th Cir. 1999) (finding no abuse of discretion); *Reliance Ins. Co. v. Louisiana Land & Exploration*, 110 F.3d 253, 257 (5th Cir. 1997) (same).[7] It also conflicts with at least one other Ninth Circuit decision. *Janicki Logging Co. v. Mateer, supra*, 42 F.3d 561, 566 (9th Cir. 1994) (decisions under Rule 16 reviewed for abuse of discretion, and no abuse of discretion where plaintiff tried to name additional defendants one year after expiration of scheduling order). However, while stating that the abuse of discretion standard applied, other courts appear to apply something approaching a *de novo* standard. See, e.g., *Inge v. Rock Financial Corp.*, 281 F.3d 613, 626 (6th Cir. 2002) ("finding" abuse of discretion).

Petitioners submit that an abuse of discretion standard is proper and that there was no such abuse here. But certiorari is necessary to resolve the conflict in the circuits on this question.

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[7] It seems clear that the Ninth Circuit could not have applied an abuse of discretion standard in this case. Under cases such as *Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir. 1995), a decision may be reversed for abuse of discretion only if premised on an incorrect legal conclusion or a clearly erroneous factual finding. Unless the Ninth Circuit held that Rule 16(b) does not apply in this case (see argument section I, *ante*), the district court did not make an erroneous legal conclusion. And the district court's finding that "Plaintiff wholly failed to pursue the matter with diligence" was not clearly erroneous; it was supported by evidence summarized above that Viehmeyer was provided documents showing petitioners' identity and involvement. App. 13-14.

CONCLUSION

The Ninth Circuit has created a conflict in the circuits regardless of how its opinion here is interpreted. This petition should therefore be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBBIE VIEHMEYER, Plaintiff-Appellant, v. CITY OF SANTA ANA; SANTA ANA POLICE DEPARTMENT; PAUL M. WALTERS; K. GRAHAM, #2156, an individual; R. CASTILLO, #1582, an individual; J. LAUNI, #1628, an individual; I. GALGUERA, #2094, an individual; M. KUPLAST, #1839, an individual; A. MORALES, #1291, an individual; DAVID REAVER, an individual; ADLERHORST INTERNATIONAL INC., a California corporation, Defendants-Appellees.	No. 02-56157 D.C. No. CV-01-00157-DOC MEMORANDUM* (Filed Jun. 16, 2003)

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted June 4, 2003
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: THOMAS and PAEZ, Circuit Judges, and REED, Distirct Judge.**

Robbie Viehmeyer appeals the district court's grant of summary judgment against him. We affirm in part and reverse in part. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

I

This case lends fresh meaning to the query "Who let the dogs out?"[1] Viehmeyer, who suffered injuries after being bitten by a police dog, alleges that he was unable to determine the identity of the canine officer who gave the attack orders until after the deadline for amending his pleadings had passed. He alleges that he should have been allowed to amend his pleadings to substitute the proper defendants for the "Doe" defendants he had already named. Under the peculiar circumstances of this case, we agree.

Under Fed. R. Civ. P. 16(b) the district court is empowered to "enter a scheduling order that limits the time to join other parties and to amend the pleadings." The Rule further provides that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge." Fed. R. Civ. P. 16(b)(6). Here, Viehmeyer contends that his various attempts to discern who ordered the attack were thwarted, and that he did not

** The Honorable Edward C. Reed, Jr., United States District Judge for the District of Nevada, sitting by designation.

[1] BAHA MEN, WHO LET THE DOGS OUT? (Artemis Records 2000).

discover the true identity until the periods identified in the scheduling order had expired. In addition, he contends that the commands of Fed. R. Civ. P. 16 must be tempered by California's rule on "Doe" defendants. *See* Cal. Civ. Proc. Code §§ 474; 583.210. Because § 1983 "borrows" the forum state's statute of limitations for personal injury actions, *see Wilson v. Garcia,* 471 U.S. 261, 280 (1985), Viehmeyer reasons that California substantive law pertaining to the substitution of "Doe" defendants applies. Under California law, when Doe defendants are named in an action, plaintiffs have an additional three years to substitute the unknown defendant. *See* Cal. Civ. Proc. Code § 583.210. This argument has some support. Indeed, we have applied California substantive law in similar circumstances to abrogate the requirements of Fed. R. Civ. P. 15(c). *Cabrales v. County of Los Angeles,* 864 F.2d 1454, 1462-63 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 1087 (1989), *reinstated by* 886 F.2d 235 (9th Cir. 1989).

Without resolving this legal question,[2] we conclude that under the totality of the circumstances, including the various impediments that Viehmeyer encountered in determining the officers' identity, Viehmeyer should have been allowed to substitute the officers in question, Quijas, Gonzalez and Blascovich as "Doe" defendants. Thus, we

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[2] We are particularly mindful that, although the issue appears to have been preserved for appeal, Viehmeyer raised this question in only an oblique fashion in the district court. Thus, we cannot fault the district court in any respect for not considering and discussing the issue in its order.

reverse the district court's order granting the defendants' motion to strike the Doe amendment.[3]

II

The district court properly granted summary judgment as to Police Chief Walters and the municipal defendants. There is no evidence in the record that Walters ratified the actions of the individual officers, created a policy or custom that led to actions taken by them, or personally participated in the incident. Viehmeyer contends that two internal memoranda, which were not authored by Walters, constitute ratification. However, the statements in the memoranda are based on the officer's version of events and do not indicate that the author approved the release of a police dog upon an already handcuffed and prone suspect, as Viehmeyer claims was done in this case. Thus, this situation is quite different from the one involved in *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998).

To the extent that Viehmeyer's claims against the municipal defendants are grounded in the same theory, they necessarily fail for the same reasons. In addition, Viehmeyer alleges that the municipal defendants' failure to train the canine handlers amounts to actionable deliberate indifference toward the potential violations of suspects' constitutional rights. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). He does not explain what

[3] Given our resolution of this question, we need not reach the question of whether the district court erred in declining Viehmeyer's discovery requests.

he believes K-9 officers should have been trained to do or not to do in order to avoid the injuries he suffered. *Cf. id.* at 385 (To establish a municipality's § 1983 liability the plaintiff must demonstrate that "there is a direct causal link between municipal policy or custom and the alleged constitutional deprivation."). As evidenced by the applicable written policy, police officers were clearly trained to use a dog only under specified exigent circumstances, none of which existed in the case of Viehmeyer's arrest as he describes it. In short, Viehmeyer did not tender sufficient evidence to raise a genuine issue of material fact on this question.

III

The district court properly granted summary judgment against all the individual defendants other than Quijas, Gonzalez and Blascovich. Individual liability under § 1983 may not be grounded in mere membership in a group, some members of which committed constitutional violations; instead, the plaintiff must make a showing of individual participation in the unlawful conduct. *Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002); *see also Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996) (Officers must be found liable for their "integral participation" in the unlawful conduct – "[b]eing a mere bystander [is] insufficient."). A careful review of the record in this case fails to reveal the requisite showing of individual participation in the unlawful conduct.

Viehmeyer also founds [sic] his claim of individual liability on an alleged failure to intervene. He accurately notes that police officers have an affirmative duty to intervene to protect those in custody from constitutional

abuses by their fellow officers. *See United States v. Reese*, 2 F.3d 870, 887-88 (9th Cir. 1993); *Ting v. United States*, 927 F.2d 1504, 1511 (9th Cir. 1991). However, such a duty is not triggered by an officer's mere presence at the scene of the constitutional violation. Instead, the defendant's failure to intervene must have caused the plaintiff's injuries. *See Ting*, 927 F.2d at 1511 (Bystander agents "may be held liable only if they personally deprived [the plaintiff] of a constitutional right by failing to perform an act which they were legally required to do which was the cause in fact of [the plaintiff's] injuries.").

According to the uncontradicted declarations of the officers, they did not witness the events in the house. Nor, as the district court notes, is there any reason to suppose that the officers, who were not the dog's handler, could have done anything to prevent the dog's attack upon the plaintiff once it began. Viehmeyer offers no evidence on the point, only speculation. It is insufficient to create a genuine issue of material fact.

IV

The district court also properly granted summary judgment to defendants David Reaver and Adlerhorst International. Assuming without deciding that these defendants acted under color of state law, we conclude that Viehmeyer's claims against Reaver fail in any event because he is unable to establish that Reaver's training of the police dog handlers was a proximate cause of his injuries. The thrust of his argument is that Reaver erroneously taught officers that police dogs are not likely to cause serious injuries and are a lower level of force than a baton strike, thus leading officers to deploy canines in

situations where the actual level of force represented by the police dog is excessive. Even assuming that this contention is correct, Viehmeyer's claim against Reaver is nonetheless without merit because there is no evidence to indicate that Reaver's training conveyed the impression that it was appropriate to use a dog under the circumstances alleged by Viehmeyer – against a prone and already handcuffed suspect. In fact, Reaver averred as follows:

> I have never trained, suggested or acquiesced in the use of a PSD to bite a criminal suspect that was in custody and under control of the police. In fact, my training includes instruction that such a use of a PSD would be illegal and unconstitutional.

Regardless of whether Reaver is correct in his assessment of the level of force represented by a canine police officer as compared to that of a baton strike, the uncontroverted evidence in this case is that he did not instruct that police could use such force against a handcuffed suspect. Thus, his training could not have been the cause of Viehmeyer's injuries, and Viehmeyer's § 1983 claim against Reaver necessarily fails. Viehmeyer's state law negligence claim against Reaver likewise fails for the same reason.

V

In sum, we affirm the judgment of the district court in all respects, except for the district court's order striking Quijas, Gonzalez and Blascovich as substituted "Doe" defendants. Defendants are awarded their costs on appeal.

AFFIRMED IN PART; REVERSED IN PART.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 01-157 DOC (MLGx)

Date: February 21, 2002

Title: Robbie Viehmeyer v. City of Santa Ana, Santa Ana Police Department, Paul W. Walters, K. Graham, R. Castillo, J. Launi, I. Galguera, M. Kuplast, A. Morales, David Reaver, Adlerhorst International Inc., Does 4 through 10, A. Blascovich, M. Gonzalez, and J. Quigas.

DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date: _____ Deputy Clerk: _____

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Kristee Hopkins	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
ATTORNEYS PRESENT FOR DEFENDANTS:

NONE PRESENT	NONE PRESENT

PROCEEDING (IN CHAMBERS):

GRANTING MOTION TO STRIKE DOE AMENDMENTS

Before the Court is Defendants' motion to strike doe amendments of A. Blascovich, M. Gonzalez and J. Quigas. The Court finds that the matter is appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for February 25, 2002 is removed from the Court's calendar. After reviewing the moving, opposing and replying papers, and for the reasons set forth below, the Court GRANTS the motion.

I. BACKGROUND

Plaintiff Robbie Viehmeyer filed the complaint in this matter on January 31, 2001. The initial action was filed against the City of Santa Ana, Santa Ana Police Department, six individual police officers, the police chief, an individual and corporate entity allegedly responsible for training Santa Ana police dogs, and does 1 through 10. Plaintiff claims excessive force was used during his arrest by Santa Ana Police Department, which included the use of a K-9 unit. Plaintiff's excessive force claim is made pursuant to 42 U.S.C. § 1983, *et seq*. Plaintiff also brings claims for negligence and violation of the Unruh Civil Rights Act, Cal. Civ. Code § 52.1, against the dog-training defendants and the doe defendants.

A scheduling order was entered in this case on June 25, 2001, setting the following dates: January 28, 2002 as the discovery cut-off, March 25, 2002 as the motion cut-off, April 15, 2002 for a pretrial conference, and May 14, 2002 as the trial date. On January 15, 2002, Plaintiff filed a notice of substitution of three doe defendants for Officers

A. Blascovich, M. Gonzalez, and J. Quigas (collectively Doe Defendants). All Defendants who have appeared in this action have filed the instant motion to strike the Doe Defendants. Plaintiff opposes the motion claiming there is good cause for the untimely substitution.

II. DISCUSSION

Rule 16(b) of the Federal Rules of Civil Procedure states that the district court shall "enter a scheduling order that limits the time . . . to join other parties and to amend the pleadings." According to the Advisory Committee Notes, this proviso was to assure "that at some point both the parties and the pleadings will be fixed." Fed. R. Civ. P. 16 advisory committee notes. Pursuant to the Rule 16(b) mandate, this Court entered a scheduling order on June 25, 2001, that included a deadline for joining parties and amending pleadings. The parties were given ninety days from the date of the order for hearing of any such motion and advised that motions to join parties or for leave to amend should be filed within sixty days of the order. The order indicated that the sixty-day deadline was to ensure that the motions may be heard and decided prior to the ninety-day deadline (ninety days would be September 25, 2001).[1] Plaintiff's notice of the doe amendments occurred on January 15, 2002. This is not in compliance with the Court's scheduling order. The notice was filed

[1] The Court further notes that the parties were aware of the possibility that Plaintiff may substitute additional parties for doe defindants and had agreed in their scheduling conference joint report to an even earlier deadline, September 1, 2001. (Joint Rule 26(f) Report p. 4, ll. 17-18.)

almost four months after the Court's sixty-day deadline and almost three months after the ninety-day deadline.

Plaintiff acknowledges, in his opposition to Defendants' motion to strike, that the amendments are in violation of the Court's scheduling order and thus the scheduling order must be altered or he must be given leave to amend. Rule 16(b) governs a motion for leave to amend pleadings when a scheduling order has established a deadline that has already expired. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). Under Rule 16(b), "a schedule shall not be modified except upon a showing of good cause and by leave of the district judge." A determination of good cause "primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The focus of the court's analysis is on the moving party's reasons for amendment, although the court may also consider the prejudice to the opposing party. *Id.*

A review of the prior proceedings in this matter evidences that Plaintiff was not diligent in seeking amendment of his complaint. He was placed on notice in June 2001, even before the scheduling conference, that Defendants possessed reports linking the Doe Defendants to Plaintiff's arrest. Defendants' Rule 26(a) disclosures, filed with this Court in June 2001, not only list the Doe Defendants as witnesses but list at least three separate reports that show, from their description, that the Doe Defendants were involved in Plaintiff's arrest. (Defs.' Mem. of Points & Auth. Ex. C.) For example, the disclosures include a reference to an April 2, 1999 report: "Santa Ana Police Dept. Supplemental Report, crime type: CPC246.3, Case No. 99-15203 re arrestee: Viehmeyer, reporting officer: Gonzalez." (Id. at p. 4, ll. 22-23.) This

report includes a narrative from Officer Gonzalez that clearly explains his involvement in Plaintiff's arrest. (Pl.'s Opp. Ex. E.) If Plaintiff had reviewed the report, he would have had the information needed to determine whether Officer Gonzalez should be substituted for a doe defendant. As he was aware of the existence of the report and Officer Gonzalez's potential as a witness in this matter, and only needed to informally request production, this information was clearly available to him prior to September 25, 2001.

Courts have determined that there is no good cause for leave to file an amended complaint when the information for amendment was available to the plaintiff prior to the scheduling order deadline. *E.g. Coleman*, 232 F.3d at 1294-95 (upholding denial of motion for leave to amend, that was made in response to defendant's summary judgment motion, where plaintiffs had information for years and offered no explanation for failure to amend earlier); *Mammoth Recreations*, 975 F.2d at 609-10 (finding no good cause where plaintiff failed "to heed clear and repeated signals that not all the necessary parties had been named in the complaint" and sought to amend after the deadline); *Tschantz v. McCann*, 160 F.R.D. 568, 572 (N.D. Ind. 1995) (finding no good cause to allow plaintiff to amend complaint to change defendants when plaintiff's counsel learned prior to the deadline, in open court and through discovery, that the named defendants were incorrect); *Financial Holding Corp. v. Garnac Grain Co.*, 127 F.R.D. 165, 166 (W.D. Mo. 1989) ("[I]f the reason for seeking the amendment is apparent before the deadline and no offsetting factors appear, the Rule 16 deadline must govern."). In *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417 (11th Cir. 1998), for instance, the court rejected

plaintiff's attempt to amend the complaint to add a defendant after the scheduling deadline. The plaintiff wished to add the defendant to obtain subject matter jurisdiction, as the original defendant alone did not employ enough workers to subject it to the Age Discrimination in Employment Act, which was needed for federal question jurisdiction. *Id.* The plaintiff's motion for leave to amend was made after the scheduling order deadline despite the following facts: (1) the information needed for the amendment was public record; (2) the facts clearly showing that there was no subject matter jurisdiction with the original defendant alone were available to the plaintiff well before the deadline; and (3) the original defendant explicitly informed the plaintiff that there was no subject matter jurisdiction two weeks prior to the deadline. *Id.* at 1419. The court held that plaintiff had not been diligent in taking steps to assert a viable theory of subject matter jurisdiction and, thus, there was not good cause to allow amendment. *Id.*

Plaintiff argues that the disclosure list did not place him on notice that these particular officers, the Doe Defendants, used force. However, the requirement for leave to amend under Rule 16 is not that Plaintiff show he only now actually knows of the need for amendment, but that Plaintiff show he exercised due diligence prior to requesting the amendment. It is clear to the Court that Plaintiff was on notice of the officers' potential involvement in June 2001. In addition, it is clear that Plaintiff did not conduct any discovery to ferret out which officers had which role in Plaintiff's arrest. By Plaintiff's own admission, he has been in possession of a police report for months that lists a number of officers, including the Doe Defendants, as having information and/or being involved

in the arrest. Plaintiff failed to depose any of these officers or submit interrogatories or other discovery requests to clarify and expand upon this information. (Mead Decl. ¶ 2 (noting that Plaintiff did not make document requests until November 2001); Shen-Urquidez Decl. ¶ 7.)

Plaintiff now suggests that Defendants should have drawn particular documents to Plaintiff's attention. However, Defendants argue, and it appears Plaintiff does not refute, that the parties were operating under an agreement whereby they would request the particular documents that they wanted produced from the disclosure list. In fact, Plaintiff's Rule 26(a) disclosures contains a reiteration of the agreement: "To the extent a party does not have originals or copies of the above documents, plaintiff will supply same upon request and if in plaintiff or his counsel's possession." (Defs.' Reply Ex. J at 10.) Plaintiff did not request any of the police reports that reference the Doe.

The Court is not suggesting that Plaintiff should have added the officers based upon the mere fact that there names were mentioned in connection with Plaintiff's arrest, but Plaintiff had several months to determine if there was a reason to include them in the action. Plaintiff wholly failed to pursue the matter with due diligence. Plaintiffs had until September 25, 2001 to amend the complaint and substitute named defendants for the does. Instead, Plaintiffs waited until January 15, 2002 to even notice the substitution, without requesting leave to amend. The parties to an action are entitled to have a time by which they are assured that the parties and claims are fixed in the action. *See* Fed. R. Civ. P. 16 advisory committee notes. The potential prejudice to Defendants, with the discovery deadline passed and two of the Doe Defendants

absent on military duty,[2] adds weight to the determination that Plaintiff should not be allowed to amend at this late date.

Accordingly, Defendants' motion to strike the substitution of A. Blascovich, M. Gonzalez, and J. Quijas for doe defendants is GRANTED.

The Clerk shall serve this minute order on all parties to the action.

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[2] Defendants represent that Officer A. Blascovich and Officer M. Gonzalez are currently on active military duty. (Mandell Decl. ¶¶ 2-3 (declaration by Sergeant of Human Resources for the Santa Ana Police Department).) Pursuant to 50 U.S.C. App. § 501 *et seq.* the action may be stayed against them if they were to remain in the suit.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBBIE VIEHMEYER, Plaintiff-Appellant, v. CITY OF SANTA ANA; SANTA ANA POLICE DEPARTMENT; PAUL M. WALTERS; K. GRAHAM, #2156, an individual; R. CASTILLO, #1582, an individual; J. LAUNI, #1628, an individual; I. GALGUERA, #2094, an individual; M. KUPLAST, #1839, an individual; A. MORALES, #1291 an individual; DAVID REAVER, an individual; ADLERHORST INTERNATIONAL INC., a California corporation, Defendants-Appellees.	No. 02-56157 D.C. No. CV-01-00157-DOC ORDER (Filed Jul. 30, 2003)

Before: THOMAS and PAEZ, Circuit Judges, and REED, District Judge.*

* The Honorable Edward C. Reed, Jr., United States District Judge for the District of Nevada, sitting by designation.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Title 42 of the United States Code, Section 1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 15(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 16(b) of the Federal Rules of Civil Procedure provides:

Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted

(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of a good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Rule 26(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

* * *

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. . . .

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or (45)(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

Rule 26(f) of the Federal Rules of Civil Procedure provides, in pertinent part:

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses . . . and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made:

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c). . . .

California Code of Civil Procedure Section 474 provides:

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: 'To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it).' The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice or identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry to a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

California Code of Civil Procedure Section 583.210 provides:

(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service shall be made within 60 days after the time the summons and complaint must be served upon a defendant.

California Government Code Section 68616, Subdivision (h) provides:

Unnamed (DOE) defendants shall not be dismissed prior to the conclusion of the introduction of evidence at trial, except upon stipulation or motion of the parties.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBBIE VIEHMEYER, Plaintiff, vs. CITY OF SANTA ANA, a municipal corporation; SANTA ANA POLICE DEPARTMENT, a California public entity; PAUL M. WALTERS, an individual; K. GRAHAM (#2156), an individual; R. CASTILLO (#1582), an individual; J. LAUNI (#1628), an individual; I. GALGUERA (#2094), an individual; M. KUPLAST (#1839), an individual; A. MORALES (#1291), DAVID REAVER, an individual; ADLERHORST INTERNATIONAL, INC., a California corporation; and DOES 1 through 10, inclusive, Defendants.	Case No. SACV CV-157 DOC (EEx) **COMPLAINT FOR DAMAGES** **(1) Excessive force (42 U.S.C. § 1983)** **(2) Civ. Code § 52.1** **(3) Negligence** DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1. The claims herein are asserted pursuant to the United States Constitution and 42 U.S.C. § 1983, *et seq.*, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343, 1367(a). The wrongful acts giving rise to this suit arose with the Central District of California, County of Orange.

PARTIES

2. Plaintiff is an individual.

3. Defendant CITY OF SANTA ANA ("SANTA ANA") is a governmental entity organized and existing under the laws of the State of California. Defendant SANTA ANA POLICE DEPARTMENT ("SAPD") is an agency of defendant SANTA ANA. These defendants are "persons" subject to suit within the meaning of 42 U.S.C. § 1983 under *Monell v. New York Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978).

4. Defendant PAUL WALTERS ("WALTERS") was, at all times material hereto, the SAPD police chief. Plaintiff is informed and believes and based thereon alleges that defendant WALTERS is responsible for implementing, maintaining, sanctioning, or condoning a policy, custom or practice under which the illegal or wrongful acts hereinafter complained of occurred. By reason of this policy, practice or custom, defendant WALTERS is liable for the damages hereinafter complained of. Plaintiff sues defendant WALTERS in both his official and individual capacities.

5. Defendants K. GRAHAM (#2156), R. CASTILLO (#1582), J. LAUNI (#1628), I. GALGUERA (#2094), M.

KUPLAST (#1839), and A. MORALES (#1291), are individuals, and, at all times material hereto, were police officers for SAPD. Plaintiff sues these defendants in both their official and individual capacities. These defendants are collectively referred to as "officer defendants."

6. Defendant DAVID REAVER is an individual, while defendant ADLERHORST INTERNATIONAL, INC., is a corporation which, plaintiff is informed and believes and based thereon alleges, is organized and existing under the laws of the State of California. These defendants are collectively referred to as "REAVER."

7. The defendants whose identities are unknown are sued herein under the names DOES 1 through 10 (hereinafter "DOES"). Plaintiff is informed and believes and based thereon alleges that DOES are responsible in some manner for the damages and injuries hereinafter complained of. Upon hearing the true names and capacities of DOES, plaintiff will give them notice of this complaint.

8. Plaintiff is informed and believes and based thereon alleges that at all times herein mentioned defendants, and each of them, were the agents, servants and employees of the other named defendants and were acting at all times within the scope of their agency and employment and with the knowledge and consent of their principal and employer. At all times herein, defendants, and each of them, were acting under the color of state law.

FACTS COMMON TO ALL COUNTS

9. Each and every allegation set forth in each and every averment of this Complaint is hereby incorporated

by this reference in each and every other averment and allegation of this Complaint.

10. In the evening hours of April 2, 1999, at 506 Shawnee Drive, Santa Ana, California, the officer defendants caused or permitted or condoned ordering a police dog to attack plaintiff ROBBIE VIEHMEYER. As a result, the dog attacked and seriously injured ROBBIE VIEHMEYER. Additionally, one and/or more of the officer defendants and DOES caused plaintiff to be subjected to additional excessive force through hitting, pushing, and/or kicking.

11. At the time of the use of excessive force, ROBBIE VIEHMEYER did not present an immediate threat of injury to anyone. There was no probable cause to believe ROBBIE VIEHMEYER posed an immediate and credible of injury, or otherwise posed a threat justifying the physical force used against him.

12. Plaintiff is informed and believes and based thereon alleges that under SAPD policy, dogs are permitted to attack and bite any criminal suspect without regard to the underlying crime, and without regard to whether the suspect poses an immediate threat of injury to anyone. Under SAPD policy, dogs are permitted to and in fact attack and bite persons where:

A. where probable cause to arrest does not exist;

B. who are not armed and not reasonably believed to be armed;

C. who pose little or no immediate threat of serious injury to any person;

D. where the use of dog to attack and bite a person is not reasonably calculated to reduce risks of injury to the arresting officers and/or non-suspects.

E. where the use of the dog to attack and bite increases, rather than lessens, officer safety;

F. without adequate warning to the person the dogs are caused or permitted to attack and bite;

G. without adequate regard to the injuries the dogs are reasonably likely to inflict on the persons attacked and bitten.

13. Plaintiff is informed and believes and based thereon alleges that REAVER, pursuant to agreement with SAPD, trained SAPD dog handlers on the circumstances, under *Cal. Penal Code* § 835a and SAPD policy, under which SAPD dog handlers may let their police dogs attack and bite, and that such training was provided knowingly and with the full approval and consent of SAPD. Plaintiff is informed and believes that REAVER'S instruction and training was grossly and wantonly defective, in that the dog handlers were trained and instructed that police dogs trained as defendants' dogs are trained do not create a substantial risk of inflicting serious injuries when permitted to attack and bite, when in fact, as all defendants well know, the dogs do inflict substantial, severe, life-threatening, permanent injuries. Further, plaintiff is informed and believes and thereon alleges that REAVER trained SAPD dog handlers that it is appropriate for a trained police dog to attack and bite a suspect as was done in this case.

14. Plaintiff is informed and believes and based thereon alleges that SAPD has delegated to REAVER, with REAVER'S knowledge and approval, the duty of training SAPD dog handlers on the constitutional limits of the use of dogs to attack and bite. Plaintiff is further informed and believes and based thereon alleges that pursuant to such delegation of duty, REAVER has trained SAPD dog handlers that a police dog which attacks and bites a suspect is less force than a police impact weapon strike used in an appropriate manner.

15. In actuality, a police dog attack is force far greater than a police impact weapon strike. Furthermore, REAVER knows that police dogs, because of their training, are more likely to cause serious injury than similar dogs lacking police dog training. Police dogs trained by REAVER create a substantial risk of causing death or serious injury which REAVER knew or should have known at the time he trained SAPD handlers. Notwithstanding such knowledge, plaintiff is informed and believes and based thereon alleges that REAVER recklessly and wantonly instructed SAPD dog handlers that trained police dogs do *not* create a substantial risk of death or serious injury.

16. REAVER knew or should have known that SAPD officers use physical force under the principles of escalation and de-escalation of force. Consequently, REAVER knew or should have known that by improperly training SAPD police officers that a police dog attack is less force than a police impact weapon strike, such improper training would cause the officers to order or permit dogs to attack and bite where such force could not be justified under California POST standards. Furthermore, REAVER knew or should have known that his training of SAPD dog

handlers would cause the officers to use the dog to cause injury under circumstances where an officer could not justify the use of the level of force that the dog represents.

17. As a proximate result of REAVER'S training, officer defendants used physical force against plaintiff ROBBIE VIEHMEYER on or about April 2, 1999, in violation of legal and law enforcement standards for the use of physical force.

18. All acts or omissions alleged to have been engaged in by any individual defendant are alleged to have been engaged in with evil motive and intent, and in callous, reckless, and wanton disregard of the rights of plaintiff.

19. From the time plaintiff's claims against defendants accrued on April 2, 1999, to on or about February 12, 2000, plaintiff was incarcerated within the meaning of California Code of Civil Procedure § 352.1(a). Therefore, the instant lawsuit is timely. *Elliot v. City of Union City*, 25 F.3d 800, 802-03 (9th Circuit 1994).

FIRST CAUSE OF ACTION – EXCESSIVE FORCE

(42 U.S.C. § 1983)

(Plaintiff ROBBIE VIEHMEYER against all defendants)

20. The conduct of each defendant violated the right of plaintiff ROBBIE VIEHMEYER to be secure in his home, person, and effects against unreasonable searches and seizures and not to be subjected to the use of excessive force, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and entitles plaintiff to recover damages pursuant to 42 U.S.C. § 1983, pursuant to *Monell v. New York City Dept. of Soc.*

Serv., 436 U.S. 658 (1978), and *City of Canton v. Harris*, 489 U.S. 378 (1989).

SECOND CAUSE OF ACTION – UNRUH CIVIL RIGHTS VIOLATION

(Cal. Civ. Code § 52.1 – excessive force)

(Plaintiff ROBBIE VIEHMEYER against defendant REAVER and DOES only)

21. REAVER, by his training and implementation of a policy of using police dogs to attack and bite persons like plaintiff who present no immediate threat of injury to anyone, through coercion have violated plaintiff's rights guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Constitution of the State of California, thereby entitling plaintiff to damages under *Cal. Civ. Code* §§ 52 and 52.1(b).

THIRD CAUSE OF ACTION – NEGLIGENCE

(Plaintiff ROBBIE VIEHMEYER against defendants REAVER and DOES only)

22. Defendant REAVER had a duty to adequately train SAPD dog handlers and SAPD police dogs. Despite REAVER'S duty to do so, REAVER negligently trained the SAPD dog handlers and dogs by, among other things, failing and/or refusing to instruct the dog handlers that a REAVER-trained dog was likely to cause serious injury.

23. As a direct and proximate cause of the aforementioned acts of defendants, plaintiff ROBBIE VIEHMEYER was injured as set forth in paragraphs above.

Wherefore, plaintiff prays judgment as follows:

On the First Cause of Action:

1. Compensatory damages according to proof;

2. As against the individual defendants, punitive damages according to proof;

On the Second Cause of Action:

3. Compensatory damages according to proof;

On the Third Cause of Action:

4. Compensatory damages according to proof;

5. Punitive and statutory damages according to proof;

On all Causes of Action:

6. Attorneys fees and costs under 42 U.S.C. § 1988; Civil Code §§ 52(b)(3), 52.1(h); C.C.P. § 1021.5; and

7. The costs of this suit and such other relief as the Court finds just and proper.

DATED: January 31, 2001

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

by /s/ Donald W. Cook
Donald W. Cook

Plaintiff demands a jury trial.

DATED: January 31, 2001

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

by /s/ Donald W. Cook
Donald W. Cook

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBBIE VIEHMEYER, Plaintiff, v. CITY OF SANTA ANA, a municipal corporation, SANTA ANA POLICE DEPARTMENT, a California public entity, PAUL M. WALTERS, an individual, K. GRAHAM (#2156), an individual, R. CASTILLO (#1582), an individual, J. LAUNI (#1628), an individual, I. GALGUERA (#2094), an individual, M. KUPLAST (#1839), an individual, A. MORALES (#1291), an individual, DAVID REAVER, an individual, ADLERHORST INTERNATIONAL INC., a California corporation, Defendants.	Case No. SACV 01-157 DOC (Eex) Honorable David O. Carter Date Action Filed: January 31, 2001 **DEFENDANT CITY OF SANTA ANA'S RULE 26(A) DISCLOSURE** Discovery Cutoff: Motion Cutoff: Trial Date:

COMES NOW DEFENDANT, City of Santa Ana, and makes the following disclosure pursuant to Federal Rule of Civil Procedure, Rule 26(a).

Witnesses

1. Robbie Viehmeyer
2. Corporal Kevin Ruiz
3. Officer Angelo Blascovich
4. Officer Michael Gonzalez
5. Officer Randy Saunders
6. Officer Art Morales
7. Officer Michael Kuplast
8. Officer John Quijas
9. Inv. Jeff Launi
10. Inv. Isidro Galguera
11. Fireman D. Park #341
12. Fireman L. Lazner # 331
13. Corporal Ronald Castillo
14. Corporal Art Morales
15. Officer Angelo Blascovich [sic]
16. Officer Ross Barrerra
17. Officer Kevin Graham
18. Antonia Maria Contreras, a.k.a Antonia Nieto
19. Dept. of Probation Officer E. Harrison
20. Dept. Of Probation Officer S. Palmer
21. Dept. of Probation Officer K. Hawking
22. Inv. R. Ashby

23. Inv. R. Stires
24. Inv. Mr. Corona
25. Officer J. Tavenner

Documents

Date	**Description**
5/3/2001	Canine Activity Training System Activity Summary Report
9/9/96-2/14/01	Monthly Training Evaluations by Adlerhorst International, Inc. Police K-9 academy
1/3/98-10/16/98	Training cards
9/99	Monthly Training Log re Ofc. Quijas and K-9 Hary
1/99-3/00	Monthly and Weekly Training Logs re Ofcr. Quijas and K-9 Hary
1997	Santa Ana Police Dept. Canine Procedures Manual regarding use of canine
2/2001	Departmental Orders regarding use of force and special units (amended 1/97); Departmental Orders # 500 re canine unit – purpose of order: to establish guidelines for use of Police Service Dogs
4/2/99	Santa Ana Police Dept. Supplemental Report, crime type: CPC246.3, Case No.: 99-15293 person mentioned: Stires, arrestee: Viehmeyer, reporting officer: Ashby
4/2/99	Santa Ana Police Dept. Supplemental Report, crime type: CPC2456. Case No.: 99-15203, witness: Corona, arrestee: Viehmeyer, reporting officer: Tavenner
4/2/99	Santa Ana Police Dept. Supplemental Report, crime type: CPC245, Case No.:

	99-15203, victim: Staof, arrestee: Viehmeyer, reporting officer Corona
4/2/99	Santa Ana Police Dept. Supplemental Report, crime type: CPC245c, Case No. 99-15203, arrestee: Viehmeyer, reporting officer: Galguera, includes a narrative
3/2/99	Arrest record re Robbie Russell Viehmeyer
4/2/99	Santa Ana Police Dept. Supplemental Report, crime type: CPC245c, Case No. 99-15203, victim: State of California, arrestee: Viehmeyer, reporting officer: Blascovich
4/2/99	Santa Ana Police Dept. Supplemental Report, crime type: WARR. Case No.: 99-15203 mentioned: Pazk Freeman, arrestee: Viehmeyer reporting officer: Barrena
4/27/99	Santa Ana Police K-9 Unit Memo to Chief Paul Walters from Sgt. Doyle Smith re canine use of force 99-15203, officer involved: Johnny Quijas, K-9 involved: Hary, arrestee: Viehmeyer
4/7/99	Confidential Santa Ana Police K-9 Unit Memo to Sgt. Doyle Smith from Ofcr. J. Quijas re canine arrest CI99-15203
4/21/99	Confidential Crimes Against Persons Memo to Chief P. M. Walters from Lt. H. F. Mooney re use of force CI No. 99-15203, recommend no further action be taken
4/10/99	Confidential Memo to Chief of Police from Cpl. Ron Castillo re administrative report of use of force (99-15203)
4/2/99	Santa Ana Police Dept. Crime Summary re CPC245CADW – on peace officers,

	CPC241d assault on a peace officer, CPC32 accessory to felony, CPC836.6b attempt to escape from a peace officer
4/2/99	Santa Ana Jail Pre-Booking Form re Antonia Contreras Booking No. 99-3252
4/3/99	Orange County Jail Pre-Booking Form re Robbie Russell Viehmeyer, Booking No.: 1871752
4/2/99	Santa Ana Police Dept. Supplemental Report, crime type: CPC246.3, Case No. 99-15203 re arrestee: Viehmeyer, reporting officer: Gonzalez
4/2/99	Santa Ana Police Dept. Supp. Report, crime type: CPC246.3, Case No. 99-15203 re arrestee: Viehmeyer, reporting officer: Saunders
4/2/99	Santa Ana Police Dept. Supp. Report, crime type: CPC245c, Case No. 99-15203, victim: State of California, witness: Cpl. Morales, suspect: Viehmeyer, reporting officer; Blascovich

DATED: June 18, 2001

STEPHAN, ORINGHER, RICHMAN
& THEODORA, P.C.

By: /s/ Martha A. Shen-Urquidez
Martha A. Shen-Urquidez

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBBIE VIEHMEYER,

Plaintiff,

vs.

CITY OF SANTA ANA, a municipal corporation; SANTA ANA POLICE DEPARTMENT, a California public entity; PAUL M. WALTERS, an individual; K. GRAHAM (#2156), an individual; R. CASTILLO (#1582), an individual; J. LAUNI (#1628), an individual; I. GALGUERA (#2094), an individual; M. KUPLAST (#1839), an individual; A. MORALES (#1291), DAVID REAVER, an individual; ADLERHORST INTERNATIONAL INC., a California corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No.
SACV01-157 DOC (EEx)

JOINT RULE 26(f) REPORT

Sch. Conf. Date: 6/25/01
Time: 8:30 a.m.
Ctrm: 9-D

(Filed Jun. 15, 2001)

TO THE HONORABLE DAVID O. CARTER, UNITED STATES DISTRICT JUDGE:

Pursuant to the Court's April 12, 2001 order and F.R.Cv.Proc. 16(b), the parties hereto submit this F.R.Cv.Proc. 26(f) report:

I. SHORT FACTUAL SUMMARY AND CLAIMS AND DEFENSES.

Plaintiff's Factual Summary

In the evening hours of April 2, 1999, at 506 Shawnee Drive, Santa Ana, California, various Santa Ana police officers (defendants K. GRAHAM (#2156), R. CASTILLO (#1582), J. LAUNI (#1628), I. GALGUERA (#2094), M. KUPLAST (#1839)), caused or permitted or condoned ordering a police dog to attack plaintiff. As a result, the dog attacked and seriously injured plaintiff. Additionally, one and/or more of these Santa Ana officers caused plaintiff to be subjected to additional excessive force through hitting, pushing, and/or kicking.

Although the officers had a warrant to arrest plaintiff for a violation of Penal Code §§ 246.3 (negligent discharge of a firearm) and 12021(a)(1) (felon in possession of a firearm), at the time of the his arrest plaintiff did not present an immediate threat of injury to anyone. There was no probable cause to believe plaintiff posed an immediate and credible of injury, or otherwise posed a threat justifying the physical force used against him.

Plaintiff contends that the force used against him was pursuant to a Santa Ana police department custom, policy or practice, condoned or ratified by defendant Paul Walters, the Santa Ana PD police chief. Plaintiff contends that

defendant David Reaver and his company Adlerhorst (collectively referred to as "Reaver") were responsible for the training of the officers in the use of the dog to attack and bite plaintiff as a police use of physical force.

Plaintiff's Legal Claims

On his first cause of action, plaintiff sues the City of Santa Ana, its police chief Paul Walters, and the various Santa Ana officers named above, contending these defendants subjected him to excessive force in violation of 42 U.S.C. § 1983. On this claim plaintiff also sues Reaver, claiming he is liable based on a failure to properly and/or adequately train, see *City of Canton v. Harris*, 489 U.S. 378 (1989).

On plaintiff's second cause of action, he sues Reaver (but not the Santa Ana defendants) for violations of his federal and state constitutional rights, made actionable under Civ. Code § 52.1.

On plaintiff's third cause of action, he sues Reaver (but not the Santa Ana defendants) for negligence.

Santa Ana defendants' Factual Summary

On April 2, 1999, defendant, the City of Santa Ana Police Department, served a high risk warrant at 506 Shawnee in the City of Santa Ana for plaintiff Viehmeyer (CI – #9910159). Plaintiff has a long history of arrests and resisting arrest. He is a known affiliate of Santa Ana gangs, with arrests for narcotics violations, possession of firearms, resisting arrest, as well as robbery. He was known to be in possession of a .30 caliber rifle (which he apparently discharged inside his mother's house located at

1534 East 4th Street). Plaintiff was also wanted for being a parolee in possession of a firearm.

For all of the foregoing reasons, on April 2, 1999 there existed the very real probability that Viehmeyer would refuse to be taken into arrest and attempt to flee. Therefore, a police canine was present to avoid unnecessary safety hazards for the officers and the other residents of the neighborhood. However, due to the presence of children in the house, the canine was not deployed. Viehmeyer was located hiding underneath a bed in one of the bedrooms. Once located, he jumped through the front window to avoid arrest, and continued to struggle with officers outside the house who were attempting to take him into custody. The police canine was ultimately deployed as it was feared that Viehmeyer was posing a threat to the officers and would continue to try to disarm them. Viehmeyer was bitten in the left calf area. Despite Viehmeyer's continued attempts to strike the canine, he was ultimately taken into custody.

Santa Ana defendants' Claims and Defenses

None of the defendants used excessive force in arresting plaintiff, nor does the City of Santa Ana or its police chief condone or tolerate the use of excessive force. The individual defendants are also entitled to qualified immunity.

David Reaver and Adlerhorst's Factual Summary

These defendants have no information about the incident sufficient to respond, due to vague allegations in the complaint including a failure to identify the dog and handler involved, and no discovery.

David Reaver and Adlerhorst's Claims and Defenses

Neither Reaver nor any Adlerhorst agent was present at the time of the alleged incident; Reaver and Adlerhorst provide police service dogs and training of the assigned handler regarding control of the dog only, and were not negligent in any manner with respect to either of these functions. Neither Reaver nor Adlerhorst determine, establish or instruct the handlers regarding department policy or the use of or deployment of the dogs, nor do they advise, counsel or instruct as to appropriate use, or circumstances for appropriate use, of the dogs.

II. SHORT SYNOPSIS OF PRINCIPAL ISSUES

Whether plaintiff was subjected to excessive force?

Whether the use of force against plaintiff was pursuant to a policy, practice or custom condoned or ratified by the City of Santa Ana and/or Paul Walters?

Whether defendant Reaver acted under color of state law in the training of Santa Ana police dog handlers and their dogs?

Whether defendant Reaver was deliberately indifferent or negligent in his training of Santa Ana police dog handlers and their dogs?

Whether the training Reaver provided was a proximate cause of injury to plaintiff?

The nature and extent of plaintiff's injuries.

Whether the facts will support an award of punitive damages against any individual or corporate defendant?

Whether the Santa Ana police officers are entitled to qualified immunity?

III. ADDITIONAL PARTIES

Depending upon what is revealed in discovery, in particular the production of the Santa Ana police department internal investigation into plaintiff's incident, plaintiff may be naming additional persons as doe defendants. It has been agreed between the parties that additional parties may be added up to and including September 1, 2001.

IV. AMENDMENTS TO PLEADINGS

None

V. ISSUES THAT THE PARTIES BELIEVE MAY BE DECIDED BY MOTION

Plaintiff knows of no issues that may be decided by motion.

Defendants Reaver and Adlerhorst state that without benefit of sufficient information about the incident which is the subject of this lawsuit, these defendants intend to move for summary judgment in their favor on all causes of action against them.

The Santa Ana Defendants believe the *Monell* and qualified immunity issues may be decided by dispositive motion.

VI. SETTLEMENT

The parties have not discussed settlement. The parties select the settlement procedure under Local Rule 23.5.2

VII. DISCOVERY PLAN

Plaintiff intends to depose three and possibly more of the officers involved in his arrest; one or more designated agent for the Santa Ana police department, Paul Walters, and David Reaver. Plaintiff reserves the right to depose additional persons depending upon defendants' discovery responses.

Plaintiff intends to propound a set of interrogatories and production requests to cover items and information not covered by the mandatory disclosures required under F.R.Cv.Proc. Rule 26.

The Reaver defendants will propound interrogatories and a request for documents requesting the factual basis and legal theories supporting each of plaintiff's causes of action, and may thereafter depose plaintiff, to establish grounds for the motion for summary judgment.

The Santa Ana Defendants intend to depose plaintiff and all of the residents present at 605 Shawnee at the time the warrant was served. These defendants further reserve the right to take additional depositions as discovery warrants and depending upon plaintiff's discovery responses.

The Santa Ana Defendants also intend to propound written discovery by way of interrogatories and requests for production of documents. These defendants further

intend to obtain a medical/psychiatric examination of the plaintiff, depending on the nature and extent of his injuries as appropriate, and depending on plaintiff's discovery responses and deposition testimony.

VIII. TRIAL ESTIMATE

Plaintiff estimates six trial days for the jury trial. The Santa Ana Defendants estimate a seven day jury trial unless the *Monell* and punitive damages are not bifurcated. In that event, these defendants estimate a jury trial of 15 days.

IX. PROPOSED DATES

Discovery cut-off: November 30, 2001;

Motion cut-off: Monday, March 25, 2002. Pursuant to the Court's April 12, 2001 order, this is the last day for5 having the motion *heard* and thus, the motion must be filed sufficiently in advance to be heard no later than March 25, 2001;

Pretrial conference: April 15, 2002;

Trial: May 14, 2002.

DATED: June 15, 2001

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By /s/ Donald W. Cook
Donald W. Cook

DATED: June 15, 2001

JOSEPH FLETCHER
City Attorney
DENAH H. YOSHIYAMA
Assistant City Attorney

AND

STEPHAN, ORINGHER, RICHMAN & THEODORA, P.C.
Attorneys at Law
Attorneys for Defendants City of Santa [sic], Santa [sic] Police Department, Paul M. Walters, K. Graham, R. Castillo, J. Launi, I. Galguera, M. Kuplast, and A. Morales

By /s/ Martha A. Shen by DWC
Martha A. Shen

DATED: June 15, 2001

KLUTE & PENNELL
Lawyers LLP
Attorneys for Defendants David Reaver and Adlerhorst International, Inc.

/See page 7 for facsimile signature/

By _____
E. Wallace Dingman

DATED:

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By /s/ _____
Donald W. Cook

DATED:

JOSEPH W. FLETCHER
City Attorney
DENAH H. YOSHIYAMA
Assistant City Attorney

AND

STEPHAN, ORINGHER, RICHMAN & THEODORA, P.C.
Attorneys at Law
Attorneys for Defendants City of Santa [sic], Santa [sic] Police Department, Paul M. Walters, K. Graham, R. Castillo, J. Launi, I. Galguera, M. Kuplast, and A. Morales

By /s/ _____
Martha A. Shen

DATED: 6/15/01

KLUTE & PENNELL
Lawyers LLP
Attorneys for Defendants David Reaver and Adlerhorst International, Inc.

By E. Wallace Dingman
E. Wallace Dingman

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROBBIE VIEHMEYER,
Plaintiff(s),
v.
CITY OF SANTA ANA, et. al.,
Defendant(s).

Case No. SA CV 01-157 DOC(EEx)

SCHEDULING ORDER

1. SETTING DISCOVERY CUT-OFF DATE: ~~11/30/01~~ 1/28/02
2. SETTING MOTION CUT-OFF DATE: 3/25/02
3. SETTING PRETRIAL CONFERENCE: 4/15/02 (at 8:30 a.m.)
4. SETTING TRIAL DATE: 5/14/02 (at 8:30 a.m.)

This Pretrial Scheduling Order governs the course of all pretrial proceedings in this case. For further guidance, consult the Federal Rules of Civil Procedure and the Local Rules.

JOINDER OF PARTIES AND AMENDMENT OF PLEADINGS

The deadline for joining parties and amending pleadings is ninety (90) days after the date of this Order. Any motions to join other parties or for leave to amend the pleadings shall be filed within sixty (60) days of the date of

this Order so that they can be heard and decided prior to the deadline.

DISCOVERY CUT-OFF

The Court has established a cut-off date for discovery in this action. All discovery is to be completed on, or prior to, the cut-off date. Expert discovery must also be completed by the discovery cut-off date. Plan now to complete discovery on the schedule set; a continuance is *unlikely*. Accordingly, the following discovery schedule shall apply in this Court:

(1) Depositions: All depositions shall be scheduled to commence at least five (5) working days prior to the discovery cut-off date. A deposition which commences five (5) days prior to the discovery cut-off date may continue beyond the cut-off date, as necessary.

(2) Written Discovery: All interrogatories, requests for production of documents, and requests for admissions shall be served at least forty-five (45) days before the discovery cut-off date. The Court will not approve stipulations between counsel that permit responses to be served after the cut-off date except in unusual circumstances and upon a showing of good cause.

(3) Discovery Motions: Any motion regarding the inadequacy of responses to discovery must be filed and served no later than five (5) days after the discovery cut-off date. The Court requires compliance with the requirements of Local Rule 7.15 in the preparation and filing of discovery motions. Whenever possible, counsel should resolve discovery problems on their own in a courteous, reasonable, and professional manner. Assistance

of the Court in the resolution of most discovery matters should not be necessary.

Parties shall follow the disclosure and timing rules of the Federal Rules of Civil Procedure and the Local Rules. Routine discovery motions will be referred to the magistrate judge assigned to the case.

MOTION MATTERS

In motion matters, counsel should note the timing and service requirements of Local Rule 7 and its subparts including:

(1) Rule 7.4 (twenty-one (21) days notice for all motions unless served by mail, in which case twenty-four (24) days is required) (notice of motion and moving papers to be filed twenty (20) days before the hearing date);

(2) Rule 7.6 (responses to all motions fourteen (14) calendar days before the hearing date); and

(3) Rule 7.7 (reply, if any, to all responses seven (7) calendar days before the hearing date).

Counsel must comply with the timing requirements of the Local Rules so that chambers can properly prepare for motion matters.

The motion cut-off date is the last day on which the Court will hear motions. Counsel should note that motions will need to be filed several weeks in advance of this date as required by Local Rule 7.

PRETRIAL CONFERENCE AND TRIAL SETTING

This case has been placed on calendar for a Pretrial Conference ("PTC") pursuant to Federal Rule of Civil Procedure 16 and the Local Rules. Unless excused for good cause, each party appearing in this action shall be represented at the PTC and all pretrial meetings of counsel by the attorney who is to have charge of the conduct of the trial on behalf of such party.

A continuance of the Pretrial Conference at counsel's request or stipulation is *highly unlikely*. Counsel should plan to do the necessary pretrial work on a schedule which will ensure its completion with time to spare before the Pretrial Conference. Failure to complete discovery work is not grounds for a continuance. The Court has a crowded docket and to displace another case already set for trial in favor of a case in which counsel have not been diligent in preparing their case would not be just.

Compliance with the requirements of Local Rule 9 is required by the Court. Carefully prepared Memoranda of Contentions of Fact and Law (which may also serve as the trial brief) and a proposed Pretrial Conference Order ("PTCO") shall be submitted in accordance with the provisions of Local Rules 9.4.10 through 9.8 and the form of the proposed Pretrial Conference Order shall be in conformity with the format set forth in Appendix A to Local Rule 9.

The Memoranda of Contentions of Fact and Law are due twenty-one (21) days before the PTC and the proposed PTCO is to be lodged seven (7) days before the PTC. Adherence to the time requirements is necessary to provide the Court and its staff time to prepare the matter.

At the PTC, counsel should be prepared to discuss means of streamlining the trial, including, but not limited to: bifurcation, presentation of non-critical testimony by deposition excerpts, stipulations as to the content of testimony, presentation of testimony on direct examination by declaration subject to cross-examination, and qualification of experts by admitted resumes. In rare cases in which the Court waives the PTC, counsel must follow Local Rule 9.11.

In drafting the PTCO, the Court expects that counsel will attempt to agree on and set forth as many uncontested facts as possible. The Court will normally read the uncontested facts to the jury at the start of the trial. A carefully drafted and comprehensively stated stipulation of facts will reduce the length of trial and increase jury understanding of the case.

All motions (except motions *in limine* dealing with admissibility of evidence) must be disposed of before the Pretrial Conference. A motion *in limine* may not be used as a substitute for a summary judgment motion. All motions *in limine* must be filed no later than the date on which the PTCO is lodged with the Court.

JURY INSTRUCTIONS/FINDINGS OF FACT AND CONCLUSIONS OF LAW

Proposed jury instructions must be timely filed. The parties should exchange proposed jury instructions and agree as much as possible on the necessary instructions before filing them with the Court. In matters tried to the Court, the parties should prepare, serve, and lodge proposed findings of fact and conclusions of law as promptly as possible and in compliance with the Local Rules. Both

parties should also submit their proposed jury instructions and findings of fact and conclusions of law on disk, preferably in Word Perfect format.

COURT APPEARANCES

Parties shall be represented at *all* court appearances by the counsel expected to be in charge of conducting trial on behalf of the parties.

Under no circumstances should counsel, or a party if the party is appearing *pro se*, fail to appear at a court appearance unless their appearance has been waived by prior order of the Court. Even if a settlement has been reached, counsel for all parties, or the party if appearing *pro se*, must appear at court appearances until a stipulation of dismissal signed by all parties has been lodged with the Court.

OTHER

Counsel are encourage [sic] to file all papers directly in the Southern Division in Santa Ana. The Court accepts conformed courtesy copies delivered to chambers.

All appropriate inquiries should be directed to Susan Sedei, Deputy Court Clerk, at (714) 338-4543. Counsel should not attempt to contact chambers directly. Counsel should list their facsimile transmission numbers on their papers in order to facilitate communication by the Deputy Court Clerk.

The Deputy Court Clerk is ordered to serve a copy of this Order by U.S. mail on all parties to this action, if not personally handed to counsel at the scheduling Conference.

IT IS SO ORDERED.

DATE: ___ June 25, 2001

/s/ David O. Carter
DAVID O. CARTER
United States
District Judge

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(Filed Jan. 15, 2002)

ROBBIE VIEHMEYER, Plaintiff, vs. CITY OF SANA ANA, etc., et al., Defendants.	Case No. SACV 01-157 (DOC (EEx) **NOTICE OF PENDING SUIT AS FICTITIOUSLY NAMED DOE 1 DEFENDANT**

TO SANTA ANA OFFICER J. QUIJAS (#1974)

PLEASE TAKE NOTICE that you have been sued as Defendant DOE 1 in the above-entitled action.

DATED: January 14, 2002

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By /s/ Donald W. Cook
Donald W. Cook

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(Filed Jan. 15, 2002)

ROBBIE VIEHMEYER, Plaintiff, vs. CITY OF SANTA ANA, etc., et al., Defendants.	Case No. SACV 01-157 DOC (EEx) **NOTICE OF PENDING SUIT AS FICTITIOUSLY NAMED DOE 2 DEFENDANT**

TO SANTA ANA OFFICER M. GONZALEZ (#2137)

PLEASE TAKE NOTICE that you have been sued as Defendant DOE 2 in the above-entitled action.

DATED: January 14, 2002

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By: /s/ Donald W. Cook
Donald W. Cook

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(Filed Jan. 15, 2002)

ROBBIE VIEHMEYER, Plaintiff, vs. CITY OF SANTA ANA, etc., et al., Defendants.	Case No. SACV 01-157 DOC (EEx) **NOTICE OF PENDING SUIT AS FICTITIOUSLY NAMED DOE 3 DEFENDANT**

TO SANTA ANA OFFICER A. BLASCOVICH (#1800)

PLEASE TAKE NOTICE that you have been sued as Defendant DOE 3 in the above-entitled action.

DATED: January 14, 2002

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By: /s/ Donald W. Cook
Donald W. Cook

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBBIE VIEHMEYER, Plaintiff, v. CITY OF SANTA ANA, a municipal corporation, SANTA ANA POLICE DEPARTMENT, a California public entity, PAUL M. WALTERS, an individual, K. GRAHAM (#2156), an individual, R. CASTILLO (#1582), an individual, J. LAUNI (#1628), an individual, I. GALGUERA (#2094),	) Case No. SACV 01-157) DOC (MLGx)) Honorable David O. Carter) **NOTICE OF MOTION AND MOTION TO STRIKE DOE AMENDMENTS OF A. BLASCOVICH, M. GONZALEZ, AND J. QUIJAS AND/OR ALTERNATIVELY TO STAY ANY ACTION AGAINST A. BLASOVICH [sic] AND M. GONZALEZ; MEMORANDUM**

an individual, M. KUPLAST (#1839), an individual, A. MORALES (#1291), an individual, DAVID REAVER, an individual, ADLER-HORST INTERNATIONAL INC., a California corporation,	) **OF POINTS AND**) **AUTHORITIES;**) **DECLARATIONS OF**) **MARTHA A. SHEN,**) **DAVID E. MEAD AND**) **IRMA MANDELL**)
Defendants.	) Date: February 25, 2002) Time: 8:30 a.m.) Ctrm: 9D

(Filed Jan. 29, 2002)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on February 25, 2002 at 8:30 a.m. in Courtroom 9-D of the above-entitled court, before the Honorable David O. Carter, defendants, the City of Santa Ana, K. Graham, R. Castillo, J. Launi, I. Galguera, M. Kuplast, A. Morales (sometimes the "City" or "defendants") will and do hereby move to strike plaintiff's amendment to the complaint adding A. Blascovich, M. Gonzalez and J. Quijas as purported does. Alternatively, the City moves to stay all proceedings against A. Blascovich and M. Gonzalez on the grounds that they are currently in military services having been called on September 27, 2001 and October 9, 2001, respectively, in response to the events of September 11, 2001.

This motion is brought on the following grounds:

1. The amendments purporting to add additional parties are made four months too late in violation of this Court's pretrial scheduling order;[1]

2. Plaintiff did not seek leave of court to amend the pretrial order and cannot establish good cause for any such amendment in any event since plaintiff was (a) aware of the existence and identity of these alleged "doe"s well prior to September 25, 2001 (the last day to amend or join parties under the pretrial order), (b) yet conducted no discovery, indeed did nothing to determine whether to add these or any other alleged defendants prior to that date;

3. "Doe"s Blascovich and Gonzalez are currently on active military duty and any such action should in any event be stayed as to them. 50 U.S.C. APP. § 501, *et seq.*

The parties have conducted a Local Rule 7.3 conference as to this motion; however, they have not been able to

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[1] No proof that the individual "doe" defendants were served with process has been filed with the court. Absent evidence of a waiver (and there does not appear to be such waiver here) Fed.R.Civ.Proc. Rule 4(e) requires of process service on individuals in this State to be by personal service or substituted service (CODE OF CIVIL PROCEDURE Section 415.10 and 415.20; *see also* GOVERNMENT CODE Section 960.2 *et seq.*; see also Fed.R.Civ.Proc. Rule 4(e)(2)) or without this State by the additional means of first class mail, return receipt requested (CODE OF CIVIL PROCEDURE Section 415.40). The defendants that have appeared thus bring this motion, especially in light of the fact that the "doe" amendments are in violation of this court's pretrial order. **Were this court to find that service has been effected on these doe defendants, then this motion is brought on their behalf as well.**

resolve this matter. See Declaration of Martha A. Shen-Urquidez, and David E. Mead, Exhibits G-H.[2]

This motion is based upon this notice of motion, the accompanying memorandum of points and authorities, the declarations of Martha A. Shen-Urquidez, David E. Mead and Irma Mandell, the pleadings and papers on file in this action, those matters of which the court can take judicial notice, and such other matters as the court may consider at the hearing of this motion.

DATED: January 28, 2002

Respectfully submitted,

STEPHAN, ORINGHER,
RICHMAN & THEODORA, P.C.

By: /s/ Martha A. Shen-Urquidez, Esq.
Martha A. Shen-Urquidez, Esq.
David E. Mead, Esq.

Attorneys for Defendants CITY OF SANTA ANA, et al.

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[2] As long as the issue of service of the doe defendants remains unresolved (see fn. 1) defendants have no choice but to bring this motion within the time that the doe defendants would otherwise be required to respond to the action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Preliminary Statement

The federal courts uniformly hold that a party may not simply amend a complaint to add parties in violation of the deadlines imposed by the court pursuant to its pretrial scheduling order: yet, that is precisely what plaintiff has done here. Not only does plaintiff flout this court's pretrial order, he does so without good cause and to the prejudice of the defendants that have already appeared, and as to as-yet-unserved defendants who are on military leave serving their country.[3]

Should plaintiff's doe amendments be permitted to stand in violation of this court's own order and the applicable law?

Defendants submit there is only one answer: no.

II. Facts

A. The Complaint

On January 31, 2001, Plaintiff filed his complaint alleging civil rights and other claims arising out of the alleged use of excessive force in connection with an arrest occurring on or about April 19, 1999. Service was not accomplished until three months later, on March 28, 2001, and those served defendants promptly answered on April 12, 2001and [sic] April 17, 2001, respectively.

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[3] But see fn. 1, *supra*.

B. The Parties' Rule 26 Disclosures and this Courts' Pretrial Order.

At or about the same time, the court entered an order setting a scheduling conference for June 25, 2001. The parties met and conferred prior to that conference pursuant to FED. R. CIV.P RULE 26, and on June 15, 2001 jointly filed a Rule 26(f) report. They contemplated that plaintiff might add additional doe defendants. In that regard, the parties specifically agreed "that additional parties may be added up to and including ***September 1, 2001.***"[4]

On June 20, 2001, even before the scheduling conference was held, the City had identified Officer Angelo Blascovich, Officer John Quijas, and Officer Michael Gonzales as witnesses, and had identified the following records as referencing Viehmeyer and the incident in question:

"4/2/99 Santa Ana Police Dept. Supplemental Report, crime type: CPC246.3, Case No. 99-15203 re ***arrestee: Viehmeyer***, reporting officer: ***Gonzalez***"

"4/2/99 Santa Ana Police Dept. Supplemental Report, crime type: CPC245c, Case No. 99-15203, victim: State of California, ***arrestee: Viehmeyer***, reporting officer: ***Blascovich***"

"9/99 Monthly Training Log re Ofc. ***Quijas*** and K-9 Hary"

"1/99-3/00 Monthly and Weekly Training Logs re Ofcr. ***Quijas*** and K-9 Hary"

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[4] See Ex. 1 [Court docket, item11] and Ex. B [Joint Rule 26(f) report, p. 4, ll. 17-18.]

"4/27/99 Santa Ana Police K-9 Unit Memo to Chief Paul Walters from Sgt. Doyle Smith re canine use of force 99-15203, ***officer involved: Johnny Quijas, K-9 involved: Hary, arrestee: Viehmeyer***"

"4/7/99 Confidential Santa Ana Police K-9 Unit Memo to Sgt. Doyle Smith from Ofcr. J. ***Quijas*** re canine arrest CI99-15203"[5]

Plaintiff's own pretrial report identified reports by Corporal Ruiz and Officer Launi (one of the named defendants), ***the later of which identified Officers Blascovich, Gonzales and Quijas as involved in plaintiff Viehmeyer's arrest as well***. (See Mead Decl., ¶3; Ex. I; Shen-Urquidez Decl., ¶5; Ex. D) Thus, in June of 2001, plaintiff knew of the identity of each of the officers he now purports to join as a "doe" defendant.

On June 25, 2001, this Court entered its Pretrial Scheduling Order which, by its express terms was "to govern[ ] the course of all pretrial proceedings in the case."[6]

While plaintiffs had agreed that they would join all additional parties by September 1, 2001 in the joint Rule 26(f) report, the pretrial scheduling order gave them ***even more*** time – until September 25, 2001:

> The deadline for joining parties and amending the pleadings is ninety (90) days after the date of this Order. Any motions to join other parties or for leave to amend the pleadings shall be filed within sixty (60) days of the date of this Order so

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[5] Ex. C [Santa Ana's Rule 26 Disclosures, filed June 20, 2001]

[6] Ex. E.

that they can be heard and decided prior to the deadline.[7]

C. Plaintiff's Failure to Join Any Additional Defendants Prior to the Deadlines Imposed by the Pretrial Scheduling Order.

Nonetheless plaintiff did not join additional parties within that 90 day period. Instead, without explanation, and without bringing any motion to amend the pretrial order or to amend the pleadings to add parties late, on January 14, 2002, plaintiffs purported to join as additional parties Officers Blascovich, Quijas and Gonzalez by way of doe amendment, seven months after the parties' Rule 26 disclosures, and almost four months (1) after the September 1, 2001 date by which they had agreed to join all parties and (2) after the September 25, 2001 date the court gave them to add any such parties.

Moreover, there is no evidence that plaintiffs have served any of these defendants. Each is an individual and under the Federal Rules, service must be accomplished by personal service, or substituted service. Fed.R.Civ.P. Rule 4(e) and CODE OF CIVIL PROCEDURE Sections 415.10, 415.20, and 415.40. No proof of service has been filed or transmitted to defendants as of this date. (Mead Decl., ¶4); the docket shows no filing of any proof of service. (Ex. A)

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[7] Ex. E, p. 1, ll. 26-28.

D. Military Status of Officers Blascovich and Gonzalez.

As set forth in the declaration of Irma Mandell, Sergeant of Human Resources at the City of Santa Ana's police department, both Officers Blascovich and Gonzalez are currently on active military duty with the United States Navy, having been called to serve their country in response to the events of September 11, 2001.

Officer Blascovich was called to duty on September 27, 2001, and Officer Gonzalez was called to duty on October 9, 2001, each for a minimum one year term. That term can be extended by the government for an additional year each. Under either the one year minimum term, or the two year term, they will be in military service well after the current trial date set in this matter.

E. Plaintiff's Lack of Good Cause.

Plaintiff filed no noticed motion to be relieved of the requirements of the pretrial order; he filed no motion for leave to amend to add new parties.[8]

Under the overwhelming case law, plaintiff is not entitled to name additional parties at this time. He has

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[8] The City notes that such motion at this time would also have violated the terms of the pretrial scheduling order. Which required all such motions to be filed so that any amendments could be determined prior to the September 25, 2001 cut off for joining additional parties. The City is informed that plaintiff has not only refused to withdraw the doe amendments, but is intending to file an ex parte application to amend the pretrial order, apparently in the hopes of preempting the City's motion to strike and somehow avoiding his burden of affirmatively showing good cause. Mead Decl., ¶5.

not complied with this court's order, and he cannot establish good cause as required by Rule 16 to ignore or amend the pretrial order. Plaintiff simply sat on his hands.

Plaintiff will contend that the City prevented him from adding additional defendants because it did not produce the documents listed on its pretrial disclosure statement prior to September 25, 2001. See Exs. G and H to Shen-Urquidez Declaration. The facts are to the contrary.

In connection with their pretrial disclosures, the parties agreed (based upon plaintiff's suggestion) that instead of wholesale production (which would simply cause unnecessary duplication), each party would simply request those documents they wanted from those listed in the Rule 26 pretrial disclosures, and that absent a request, the parties would not be required to produce documents listed in their disclosure. Shen-Urquidez Declaration, ¶7; Exs. G-H. In meet and confer correspondence, plaintiff did not dispute the existence of this agreement. He simply contends that the City should somehow be penalized for having acceded to it, and that this court should ignore the fact that plaintiff never requested a single document listed on the City's pretrial disclosure statement at any time prior to September 25, 2001.

Not only that, but plaintiff never initiated any affirmative discovery (either depositions, document requests or interrogatories) addressed to the City at any time between June of 2001 and November of 2001. Mead Decl., ¶2; Shen-Urquidez Decl., ¶7.

II. Argument

A. Summary of Argument.

Plaintiff's unilateral filing of doe amendments is in violation of law and this court's pretrial order. Moreover, even had plaintiff proceeded properly and filed a noticed motion for leave to amend the pretrial order, he would not have succeeded. Under the facts and the law, plaintiff cannot establish good cause. Plaintiff cannot show that he exercised due diligence (let alone any diligence) in connection with seeking to join these new defendants.

The law provides no relief to plaintiff:

(1) A party may not simply add parties, amend a complaint, or take any action in violation of a pretrial order. *Johnson v. Mammoth Recreations,* 975 F.2d 604 (9th Cir. 1992).

(2) The pretrial order is not a trivial paper to be disregarded at a party's whim. *Id.* at 609.

(3) A party may, arguably, move to amend the pretrial order but such motion is not to be granted absent an affirmative showing of good cause – an exacting standard – i.e., that a plaintiff *exercised due diligence* and *despite such diligence, could not have acted sooner*. *Id.* at 608.[9]

The motion to strike should be granted; it may also be granted on the additional basis that plaintiff's conduct prejudices the as yet unserved defendants, as well as those that have appeared in this action. Had plaintiff acted

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[9] *Johnson* and a representative sample of the case law to the same effect, are discussed in greater detail below.

promptly, Officers Blascovich and Gonzalez could have appeared and been deposed before they went on military duty. Under the Soldiers and Sailors' Relief Act, 50 U.S.C. APP §501 *et seq.*, this civil action cannot proceed to judgment against them, as they cannot be forced to appear and defend it now, having undertaken their burden of defending this country. They would be prejudiced if this action were to proceed against them now without the ability to effectively participate and defend; the named defendants would be prejudiced because these unserved defendants cannot participate or defend.

Alternatively, under the Relief Act, this action should be stayed against Officers Gonzalez and Blascovich given the fact that these does are currently on military service with the U.S. Navy.

B. Under Applicable Law, Plaintiff's Action In Unilaterally Adding Defendants Four Months Late, And Over 7 Months After He Knew of Their Existence, Defeats Any Amendment.

The seminal case is *Johnson v. Mammoth Recreations*, 975 F.2d 604 (9th Cir. 1992), out of the Ninth Circuit. There, plaintiffs, a injured skier and his wife, sued a defendant holding company for negligent operation of a ski resort. In discovery responses and letters, defendant informed plaintiffs that the resort was owned and operated by a separate corporation. Under Fed. R. Civ. P. 16, a pretrial scheduling order was entered, setting a deadline for joinder of parties. Four months after that deadline, plaintiffs moved to amend under Fed. R. Civ. P. 15 to add the resort operator as a party, and defendant moved for summary judgment. The court denied plaintiffs' motion, and granted defendant's.

1. The Exacting "Good Cause" Standard of Rule 16, and Not the More Lenient Rule 15 Amendment Standard, Applies.

With respect to plaintiffs' belated attempt to add an additional party, the appellate court affirmed, holding that once the pretrial order was entered, it set the terms for the conduct of the case. Under Rule 16(b), in order to add the additional defendant, plaintiffs had to show "good cause" for non-compliance with the order. They had not.

As the appellate court recognized, the issue was a narrow one: when and under what circumstances could a party add an additional defendant once the district court had entered a pretrial order limiting such addition. *Id.* at 607. Plaintiffs contended that, irrespective of the pretrial order, since FED.R.CIV.PROC. Rule 15 envisaged and encouraged liberal amendment of pleadings, that controlled, and the trial court should have permitted them to amend. Not so, held the court:

> Rule 15 ***does not*** provide the standards by which we consider [plaintiffs] motion to amend to add Mammoth Mountain Ski Area, Inc. as a defendant. ***Once the district court had filed a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16 which established a timetable for amending pleadings that rule's standards [– i.e., Rule 16's] controlled.*** *Id.* at 607-608.

Thus, concluded the court, plaintiffs' attempt to add an additional defendant "was governed by Rule 16(b), not Rule 15(a)." *Id.* at 608 (digesting cases).

Under Rule 16, a party seeking to avoid the limitations of the court's pretrial order must bring a motion and

show good cause, as defined by Rule 16 and the case law interpreting it. The good cause standard is not the equivalent of Rule 15's liberality of amendment standard. It is significantly narrower and requires that despite exercising due diligence, a plaintiff could not have complied with the pretrial order:

> Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s "good cause" standard primarily considers ***the diligence of the party seeking the amendment***. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment);[digested cases omitted]; 6A Wright, Miller & Kane, Federal Practice and Procedure §§ 1522.1 at 231 (2d ed. 1990) ("good cause" means ***scheduling deadlines cannot be met despite*** party's diligence). Moreover, ***carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief***." 975 F.2d at 609.

2. Johnson and Similar Case Law from Every District Refuse to Treat Pretrial Orders in as Cavalier a Fashion as Does Plaintiff Here.

In *Johnson*, plaintiffs argued that the district court's conduct elevated technicalities above the primary policy of determining cases on the merits. *Johnson* rejected that contention as a matter of law. Simply put, plaintiffs were not entitled to subvert the pretrial order in that case, nor may they do so in this case:

> A scheduling order "is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Gestetner Corp.*, 108 F.R.D. at 141. The district court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of Johnson's case. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier. Rule 16 was drafted to prevent this situation and its standards may not be short-circuited by an appeal to those of Rule 15. *Id.* at 610-11.

Johnson is not alone in (a) refusing to condone late filed amendments in violation of pretrial orders; (b) requiring an affirmative showing of good cause to amend pretrial orders and in rejecting requests to amend pretrial orders based on inadvertence, carelessness or neglect; and (c) refusing to treat the pretrial order as if it carried no weight or effect.

The following is a non-exclusive list of cases upholding denials of amendments sought after the deadlines of the pretrial order:

1. *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149 (1st Cir. 1992). This was a breach of oral employment contract/wrongful termination dispute. Plaintiffs appealed the trial court's (a) grant of J.N.O.V. on the jury's damages award for breach of contract, (b) grant of summary judgment on their wrongful termination claim; and (c) denial of their motion for leave to amend to state a claim for mental pain and suffering resulting from breach of contract. The appellate court affirmed. On the denial of leave to amend, the court held that the district court did not abuse its

discretion in denying leave because the plaintiffs, "in blatant disregard" of the deadlines in the pretrial order, sought to amend their complaint two moths after the deadline for doing so had passed. 959 F.2d 1149, 1154. Moreover, the standards governing amendments under FED.R.CIV.PROC. Rule 15 did not apply where, as here, plaintiffs had disregarded the pretrial order: "Rule 16(b)(1) . . . requires district court judges to "enter a scheduling order that limit the time (1) to join other parties and to amend the pleadings." Fed.R.Civ.P. 16(b)(1). . . . The district court did not abuse its discretion by adhering to its scheduling order and refusing to allow plaintiffs to amend their complaint. Under the facts here, allowance of an amendment would have nullified the purpose of rule 16(b)(1)." 959 F.2d at 1155

2. *Marcum v. Zimmer*, 163 F.R.D. 250 (S.D.Va. 1995). Plaintiffs had formally requested, and were granted a number of extensions of the deadlines of the district court's pretrial scheduling order in order to implement a comprehensive discovery plan and to accommodate plaintiffs' counsels' vacation schedule. After defendants moved (not for the first time) to dismiss and for summary judgment, plaintiffs sought a further extension to permit amendment to the complaint. The district court granted defendants motions and denied plaintiff's motion to amend, recognizing that once a rule 16(b) scheduling order is entered, the propriety of amendment is not reviewed under the Rule 15 standard, but rather under "the more exacting "good cause" standard of Rule 16(b)." 163 F.R.D. at 253:

> With good reason, recent decisions have recognized '[a] scheduling order [under Rule 16[b] is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without

> peril.' *Goewey v. United States*, 886 F.Supp. 1268, 1283 (D.S.C. 1995); *Jordan v. E.I. DuPond De Nemours & Co.*, 867 F.Supp. 1238, 1250 (D.S.C. 1994). Indeed, a scheduling order is the critical path chosen by the trial judge and the parties to fulfill the mandate of Rule 1 in 'securing the just, speedy and inexpensive determination of every action.' Specifically, the Advisory Committee for Rule 16 observed that subdivision (b)(1) of the Rule 'assures that at some point both the parties and the pleadings will be fixed, by seeking a time within which joinder of parties shall be completed and the pleadings amended.' 163 F.R.D. at 253.

Thus, in such contexts, a plaintiff must first satisfy the requirements of Rule 16 – and affirmatively show due diligence, not merely carelessness or inattention – to amend, and then must further satisfy the requirements of Rule 15. *Id* at 254. Since plaintiff did not meet the requirements of Rule 16, the district court properly denied its motion to amend the pretrial order to permit plaintiffs to amend the complaint. Further, such denial does not exalt procedure over substance: "disregard of the [pretrial order] would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." 163 F.R.D. at 255, fn.9 (following *Johnson*, *supra*, 975 F.2d at 610.)

3. *Tschanz v. McCann*, 160 F.R.D. 568 (N.D.Ind. 1995). Plaintiff in a civil rights case alleging violation of the 4th and 14th amendments of the Constitution filed a motion seeking leave to file a belated amendment to her complaint and to dismiss wrongfully named defendants. The request came well after the deadline for anyone to add additional parties or to amend the complaint, and was

tardy because the deadline had been miscalendared by counsel. Plaintiff's motion was denied, ***and that denial was affirmed***. The reason: As recognized by law, once a pretrial order is entered, the good cause requirement of Rule 16 must be met before a court can even consider allowing amendment under the standards governing Rule 15. The Rule 16 "good cause" standard "primarily considers the diligence of the party seeking amendment. In other words, in order to demonstrate "good cause" a party must show that despite their diligence the time table could not reasonably have been met." 160 F.R.D. at 570 (following *Johnson*, *supra* 975 F.2d at 609) Neither "mere oversight," "inadvertence," or "office turnover" is enough.[10] A party cannot fail to pay attention to a case, or fail to prosecute his case diligently, and then avoid the consequences. It is exactly this kind of improper case management that Rule 16 was designed to avoid. 160 F.R.D. at 572.

4. *Bradford v. Dana Corp.*, 249 F.3d 807 (8th Cir. 2001). Plaintiff alleged that the defendant demoted, suspended and terminated her because of her race and gender. The district court entered a case management order. The defendant moved for summary judgment; and plaintiff requested modification of the case management order to permit her additional time to respond to summary judgment, to conduct discovery and to push back the then impending trial date. The district court denied her request under Rule 16(b). Thereafter, the district court granted summary judgment in favor or defendant. The judgment was affirmed. As to the denial of plaintiff's request to

[10] 160 F.R.D. at 572 (digesting cases).

amend the CMO, the court recognized that a party seeking to amend a case management order must affirmatively establish "good cause." "As a vehicle designed to streamline the flow of litigation through our crowded dockets, ***we do not take case management orders lightly and will enforce them***." 249 F.3d at 809 (emphasis added). While prejudice to the other party provides an additional basis for denial of an order seeking to amend a pretrial order, the threshold inquiry is whether there is good cause for amendment. In the absence of "good cause," there is no need to even examine whether there has been prejudice. *Ibid.*

5. *Coleman v. The Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000) (age discrimination claim in which denial of belated leave to amend in violation of pretrial order's deadlines affirmed, following *Johnson*.)

3. Applying the Law to the Facts, Plaintiff's Amendments Must be Stricken.

In short, even had plaintiff proceeded by way of a motion to amend the pretrial scheduling order he could not show any basis for his "cavalier" disregard of the time limits contained in the order.

As set forth in Section II and in the declaration of Martha Shen-Urquidez and David Mead, the plaintiff knew of the identity and existence of Officers Blascovich, Gonzalez and Quijas, and of the fact that they were involved in his arrest by virtue of the reports in the possession of plaintiff's counsel. The City's Rule 26 disclosures listed each of the reports to indicate their involvement in the arrest.

Plaintiff did not notice these officers as deponents; plaintiff did not request the documents listed by the City in its disclosures. To the contrary, after receiving the City's Rule 26 disclosure, plaintiff declined informal production under FED. R. CIV. PRO. Rule 26, instead agreeing that defendants would only be required to turn over documents specifically and affirmatively requested.

Moreover, plaintiff made no formal discovery request for documents at all until November, 2001, well after the date to amend or join parties had passed. The responsive documents were then produced.

Defendants respectfully suggest that had plaintiff brought a motion for leave to amend the pretrial order, his only grounds for amendment would be *lack* of diligence, or the carelessness of counsel. What prevented plaintiff from requesting the documents listed in the City's pretrial disclosures *in June, July, or August?*. Alternatively what prevented plaintiff from serving written discovery, production of documents or setting depositions *in June, July, or August*?

Instead of showing affirmative diligence, plaintiff attempts to paint the City black. First, and as a matter of common sense, if it was the City's intent to stonewall or hide the facts, the City would not have taken such care to list Officers Blascovich, Gonzalez and Quijas as witnesses, or to list the reports they wrote, and that identified them as officers involved in the arrest of Viehmeyer.

Second, even if it would have been the better practice to have turned over the documents listed in the Rule 26

disclosures earlier nothwithstanding the parties' contrary agreement,[11] *plaintiff still does not explain how the City's not having done so prevented plaintiff from obtaining the information he needed to add these defendants in discovery at any time from June through September.* The City submits this is because plaintiff cannot provide such an explanation. Ergo, he cannot establish good cause to circumvent the pretrial order – or his own assurances, prior to entry of the pretrial order, that they would join all defendants by September 1, 2001. The motion to strike should, thus, be granted.

C. The Doe Amendments Additionally Prejudice Defendants.

While the Rule 16 standard does not require defendants to show prejudice – lack of diligence itself enough to refuse amendment – defendants can show prejudice here. Officers Blascovich and Gonzalez are both on military duty and will be so ***at least*** through September and October, 2002.

Even assuming they have been served[12], how are they to appear in court or for deposition, retain counsel and effectively defend themselves?

How can any party, including the remaining defendants, have the benefit of their testimony and input?

Under the Soldiers and Sailors' Relief Act, 50 U.S.C. APP §501 *et seq.*, our soldiers called to duty are entitled to

[11] A point the City does not concede given the parties' agreement.

[12] The City has no evidence that they have been.

protection from having to face civil liabilities against which they cannot defend while in service. *The Sylph* 42 F.Supp. 354, 355-56 (D.N.Y. 1941) purpose of act to "afford protection" to military servicemen "while in service of [the Nation]." It provides for "suspension of enforcement of civil liabilities against persons in service of the United States.")

By definition requiring these officers to appear and defend this action "in absentia" is prejudicial to them. Requiring the other defendants to deal with allegations concerning Officers Blascovich and Gonzalez is prejudicial to them as well. This is simply additional evidence that plaintiff's amendments should be stricken.

D. Alternatively, Officers Blascovich and Gonzalez Would Are Entitled to Have This Action Stayed As to Them.

The Soldiers' and Sailors' Relief Act provides that actions against those called to military service may be stayed. 50 U.S.C. APP. Section 510 *et seq*. Under the circumstances, and especially given plaintiff's attempt to so add these defendants so late – an act plaintiff cannot blame on Officers Blascovich and Gonzalez – if this court were inclined to allow the addition of these defendants, the court should only do so conditioned upon a stay as to them.

III. Conclusion.

For all the foregoing reasons, the City's motion should be granted.

DATED: January 28, 2002

Respectfully submitted,

STEPHAN, ORINGHER, RICHMAN
& THEODORA, P.C.

By: /s/ Martha A. Shen-Urquidez, Esq.
Martha A. Shen-Urquidez, Esq.
David E. Mead, Esq.

Attorneys for Defendants
CITY OF SANTA ANA, et al.

DECLARATION OF MARTHA A. SHEN-URQUIDEZ

I, MARTHA A. SHEN-URQUIDEZ, declare as follows:

1. I am an attorney licensed to practice before all the courts of the State of California. I am an attorney with the law firm of Stephan, Oringher, Richman & Theodora, P.C., counsel of record for Defendants CITY OF SANTA ANA, et al. . I have personal knowledge of the following facts and if called to testify could and would testify competently thereto.

2. On January 31, 2001, Plaintiff filed his complaint alleging civil rights and other claims arising out of the alleged use of excessive force in connection with an arrest occurring on or about April 19, 1999. A true and correct copy of the docket in this case, reflecting such service, and the other docketed events in this action, is attached and incorporated by this reference as Exhibit A.

3. In April, the court entered an order setting a scheduling conference for June 25, 2001. The parties met and conferred prior to that conference pursuant to FED. R. CIV.P RULE 26, and on June 15, 2001 jointly filed a Rule

26(f) report. They contemplated that plaintiff might add additional doe defendants. In that regard, the plaintiff said that he would need only to ***September 1, 2001*** to add parties. A true and correct copy of the parties' joint report under Rule 26 is attached and incorporated by this reference as Exhibit B.

4. Even before the scheduling conference was held, our office had identified Officer Angelo Blascovich, Officer John Quijas, and Officer Michael Gonzales as witnesses in the City's Rule 26 pretrial disclosures provided to plaintiff in June of 2001, a true and correct copy of which is attached and incorporated by this reference as Exhibit C. The City's disclosures also identified with specificity records relating to plaintiff's arrest and the officers and canine involved in the arrest, as set forth more particularly in Exhibit C.

5. Plaintiff's own pretrial report identified reports by Corporal Ruiz and Officer Launi (one of the named defendants). A true and correct copy of that report is attached and incorporated by this reference as Exhibit D. In response to a request by David Mead of our office, plaintiff sent over the reports it had in June that were referenced in plaintiff's Rule 26 disclosure. The Launi report, referenced in Mr. Mead's declaration, itself identifies each of the three "doe"s at issue in this motion.

6. On June 25, 2001, this Court entered its Pretrial Scheduling Order which, by its express terms was "to govern[ ] the course of all pretrial proceedings in the case." A true and correct copy of the order is attached and incorporated by this reference as Exhibit E.

7. The attorneys from our office handling this litigation were myself and David Mead. In connection with

the parties early meeting of counsel, at plaintiff's suggestion, the parties agreed that they would not each produce all documents they had. Rather they would list them, and then each party would request those documents that they wanted. Plaintiff, through counsel never made any request for any of the documents on the City's pretrial disclosure statement at any time through September, 2001. Plaintiff never noticed the deposition of Officers Blascovich, Gonzalez and Quijas even though they were listed in the City's pretrial disclosure statement provided to plaintiff in June of 2001.

8. Attached and incorporated by this reference are true and correct copies of the following documents:

a. Exhibit F: The three "notices of pending suit" served on our office purporting to add Officers Blascovich, Gonzalez and Quijas as doe defendants;

b. Exhibit G: My letter to plaintiff's counsel requesting a meet and confer;

c. Exhibit H: Plaintiff's letter in response and my follow up letter to him;

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 28, 2002, at Los Angeles, California.

/s/ Martha A. Shen-Urquidez
MARTHA A. SHEN-URQUIDEZ

DECLARATION OF DAVID E. MEAD

I, DAVID E. MEAD, declare as follows:

1. I am an attorney licensed to practice before all the courts of the State of California. I am an attorney with the law firm of Stephan, Oringher, Richman & Theodora, P.C., counsel of record for Defendants CITY OF SANTA ANA, et al. I have personal knowledge of the following facts and if called to testify could and would testify competently thereto.

2. At no time prior to the deadline for adding parties set forth in the court's pretrial order did plaintiff, through counsel, ever make any request for any of the documents on the City's pretrial disclosure statement. Indeed, plaintiff, through counsel, never requested the documents at all except through written document requests propounded on November 16, 2001. I responded to the document request in writing in December of 2001, and produced responsive documents, including police reports listed on the City's pretrial disclosure statement, in January, 2001. Plaintiff never noticed the deposition of Officers Blascovich, Gonzalez and Quijas even though they were listed in the City's pretrial disclosure statement provided to plaintiff in June of 2001.

3. After the plaintiff served our office with the "notices of pending suit," I called plaintiff's counsel and asked for copies of the Ruiz and Launi reports referenced in plaintiff's pretrial disclosure statement. A true and correct copy of the reports that plaintiff provided in response to my request are attached and incorporated as Exhibit I.

4. While we have received the "notices of pending suit" we have not received anything showing that the "doe" defendants have been served.

5. On January 28, 2001, I conducted a telephonic meet and confer with plaintiff's counsel regarding this motion. We were not able to agree. Plaintiff advised that they would be filing an ex parte application on Wednesday, January 30, 2001 and asked if we would be opposing it. I told plaintiff's counsel that if it were filed, we would oppose it.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 28, 2002, at Los Angeles, California.

/s/ David E. Mead
DAVID E. MEAD

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBBIE VIEHMEYER, Plaintiff, vs. CITY OF SANTA ANA, etc., et al., Defendants.	Case No. SACV 01-157 DOC (EEx) **PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE DOE AMENDMENTS; DECLARATION OF DONALD W. COOK** Date: 2/25/02 Time: 8:30 A.M. Ctrm: 9D

I. SUMMARY.

Assuming defendants have standing, see Part II, *infra*, their motion turns on two issues. First, should the scheduling order be modified to permit adding three persons as defendants past the September 2001 cut-off date? Second, assuming good cause exists for the modification, are the claims against the newly named defendants time-barred? Plaintiff submits that good cause exists for bringing in the additional defendants. Defendants and their counsel suppressed the evidence revealing the

involvement of the doe defendants. Second, the claims are timely. Therefore, the motion should be denied.

II. DEFENDANTS LACK STANDING.

The moving parties, defendants City of Santa Ana, K. Graham, R. Castillo, J. Launi, I. Galguera, M. Kuplast, A. Morales, do *not* include the three Santa Ana officers named in the doe amendments, *i.e.*, A. Blascovich, M. Gonzalez and J. Quijas. Therefore, moving parties lack standing. On these grounds alone the motion should be denied.

III. THERE IS GOOD CAUSE FOR AMENDING THE SCHEDULING ORDER.

Plaintiff agrees that since the June 2001 scheduling order required that all new parties be added no later than Monday, September 24, 2001, the order must be modified to permit suit in this action the recently named doe defendants, and furthermore, the modification requires a showing of good cause. *E.g., Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). (Through inadvertence, plaintiff filed and serve the doe amendments before realizing that the filing was past the September cut-off date. Declaration of Donald W. Cook, ¶7.) Here good cause exists:

- Plaintiff contends that an officer struck him with a baton, and another hit him in the face using the officer's rifle butt. Therefore, an officer encouraged a police dog to attack him while he lay on the ground, handcuffed. Mr. Viehmeyer, though, cannot identify those officers.

- Before filing suit, plaintiff's counsel tried to obtained from defendant Santa Ana the police reports regarding his arrest. Santa Ana refused to provide any reports.

- Until early this year, the only police reports plaintiff had did *not* identify any of the three doe defendants as having used force against plaintiff. Moreover, the reports plaintiff had identify *another* officer, defendant K. Graham, as the officer who ordered the dog to bite Mr. Viehmeyer.

- Police reports in defendants' possession (but not plaintiff's until this year) state that doe defendant Blascovich, using his rifle butt, hit Mr. Gonzalez in the face, while doe defendant Gonzalez struck him using the officer's flashlight. One of the reports also states that it was doe defendant Quijas, *not* Graham, who ordered the dog to bite plaintiff.

- Pursuant to the parties' agreement, the reports mentioned above should have been voluntarily produced well before the September 24, 2001 cut-off date without the necessity of the [sic] a formal production request Defense counsel, probably aware that plaintiff had not named the three officers who admit to using force against plaintiff, withheld the reports in violation of the parties' agreement.

Declaration of Donald W. Cook, ¶¶3-12.

In arguing there is no good cause, defendants contend they disclosed the doe defendants involvement in their Rule 26 initial disclosures served June 18, 2001. See Motion, 5:16-20. This contention is not only incorrect, but deliberately deceitful.

Defendants point to plaintiff's Rule 26 disclosure in which he listed two reports, one by Ruiz and the other by Launi. Defendants state that Launi's report, Exhibit I to the motion, "identified Officers Blascovich, Gonzales and Quijas as involved in plaintiff's Viehmeyer's arrest." Motion 5:17-18. What defendants omit are the critical details. The report is seven pages. The first four is a list of Santa Ana personnel as having some *unspecified* involvement in Mr. Viehmeyer's arrest. These pages provide no information whatsoever on what any officer, including Blascovich, Gonzalez and Quijas, supposedly did or observed. The remaining three pages provide a narrative description of plaintiff's arrest, describing the actions of various Santa Ana officers. In these three pages not only is there *no* mention of Blascovich, Gonzales and Quijas, Launi's report states that defendant K. Graham is the officer who ordered the dog to bite Mr. Viehmeyer:

> Cpl. Castillo, ***K-9 Ofcr. Graham*** and I confront Viehmeyer at gun point ordering him to stop. At the same time, Inv. Galguera came flying out the same window after Viehmeyer. Viehmeyer didn't comply with our orders. He started to run back toward the front porch. Just prior to him reaching the porch, he was met by Inv. Kuplast who was now exiting the front door. Kuplast began fight with Viehmeyer as he was backed up by Cpl. Morales. We moved in to assist but were ordered back by ***Graham so the K-9*** could be released and used to take Viehmeyer into custody.
>
> The dog was released and made contact with Viehmeyer.

Exhibit I to motion, page 6 of report.

Thus, according to Launi's report, Blascovich, Gonzales and Quijas did not use any force on Mr. Viehmeyer, while Graham was the officer who ordered the dog to bite.

Defendant's reliance on the three page Ruiz report, also Exhibit I to Motion, is equally unavailing. In this report Ruiz is principally concerned with describing the retrieval of evidence. While the report briefly mentions Mr. Viehmeyer was bitten by the dog, it provides no details and no information on whatsoever about which officers were responsible for using the dog or any other force against Mr. Viehmeyer.

Defendants also falsely claim that their listing in their Rule 26 initial disclosure revealed the doe defendants' involvement. Defendants' listing, see Exhibit C, page 4 (quoted at page 5 of the motion) did not state that any of the doe defendants had used force, nor did the listing describe the doe defendants' involvement. The listing says only that there are police reports prepared by Gonzalez, Blascovich, and Quijas regarding Mr. Viehmeyer's arrest. It is strange indeed to find a *defense* attorney taking the view that her clients can and should have been sued merely on evidence that they authored a police report!

Finally, there was defendants' breach of the agreement to voluntarily produce the relevant and non-privileged documents long before September 24, 2001. Declaration of Donald W. Cook, ¶¶8-12. Had defendants honored that agreement, they would have produced *all* of the reports listed in their Rule 26 initial disclosures, except for the two reports already in plaintiff's possession.

Defendants' claim that the agreement did not require them to produce documents but only to identify them so plaintiff could formally request them pursuant to F.R.Cv.Proc. Rule 34, see Declaration of Martha A. Shen-Urquidez ¶7, is nonsensical and contradicted by the record. It was never necessary to agree to identify documents since F.R.Cv.Proc. 26(a)(1)(B) already obligated the parties to do so. W. Schwarzer, A. Tashima, J. Wagstaffe, *California Practice Guide, Federal Civil Procedure Before Trial*, ¶11:139 (It is sufficient under Rule 26 to identify documents; the rule "does not require actual disclosure of individual documents.").

Then there is the record in this case showing counsel for both sides implicitly acknowledging the earlier agreement to voluntarily produce documents. Declaration of Donald W. Cook, ¶¶9-12. Defendants' present disavowal of the agreement should be treated for what it is – an about face taken in order to secure an unfair advantage.

IV. THERE IS NO PREJUDICE IN AMENDING THE SCHEDULING ORDER.

The claims against the doe defendants are not time barred. Plaintiff has up to three years to name and serve the doe defendants. C.C.P. § 474; *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1462, 64 (9th Cir. 1988) (Applying California law, Ninth Circuit, in action under 42 U.S.C. § 1983, holds that plaintiff was entitled to name and serve a doe defendant nearly two years after lawsuit was filed.). Furthermore, the doe defendants will be represented by the same counsel, and will have the same interest. Finally, plaintiff has recently

filed a separately lawsuit against the doe defendants, *Viehmeyer v. Quijas*, SACV02-113 AHS (filed February 2, 2002) which should result in that case being transferred to this Court.[1]

V. CONCLUSION.

For the foregoing reasons defendants' motion should be denied and the Court should amend the scheduling order to allow the filing and service of the notices naming the doe defendants.

DATED: February 13, 2002

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By: /s/ Donald W. Cook
Donald W. Cook

DECLARATION OF DONALD W. COOK

I, DONALD W. COOK, declare:

1. I am one of the attorneys representing plaintiff Robbie Viehmeyer. Although the Court's June 2001 scheduling order required that all new parties be added no later than Monday, September 24, 2001, I am requesting that the Court grant leave to allow plaintiff to add three Santa Ana officers as defendants, and to permit plaintiff to depose the Santa Ana officers after the discovery cut-off

[1] Plaintiff filed a notice of related case in SACV02-113.

date. As explained below, good cause exists in that I only recently discovered the involvement of these officers because, in violation of the parties' disclosure agreement, defense counsel had withheld the documents revealing these officers' involvement. Defense counsel's breach was particularly egregious because these three officers are the only ones who admit to using force against plaintiff.

2. Mr. Viehmeyer contends that in the evening of April 2, 1999, at 506 Shawnee Drive, Santa Ana, California, various Santa Ana police officers used excessive force when taking him into custody on a warrant. He testified that when he surrendered inside a bedroom, a Santa Ana officer struck him in his face, using the butt of the officer's gun. Another officer began hitting him with a baton, knocking Mr. Viehmeyer through a bedroom window and onto a driveway. Once outside, he was handcuffed. A Santa Ana police dog was then sicced him.

3. Because Mr. Viehmeyer did not and does not know the identity of the officers who struck him and sicced a dog on him, I have had to rely on police reports for identifying defendants. Before filing the lawsuit, I made a public records request on the City of Santa Ana for reports regarding Mr. Viehmeyer's arrest. Santa Ana refused to provide any. See **Exhibit A**, true copy of May 21, 1999 letter from the Santa Ana police department.

4. When I prepared and filed Mr. Viehmeyer's complaint, I had only two Santa Ana police reports. The first, prepared by Cpl. K. Ruiz and consisting of three pages, is attached as **Exhibit B**. The second, consisting of seven pages and prepared by Inv. J. Launi, is attached as **Exhibit C**. Both reports are attached as Exhibit I to defendants' motion. I obtained these reports from Mr.

Viehmeyer's attorney in the underlying criminal case. Of the two reports, only Launi's (**Exhibit C**) describes Mr. Viehmeyer's arrest. (Ruiz's three page report is principally concerned with the gathering of evidence.) Of the seven officers Launi mentions in his narrative, six are described as having some possible contact with Mr. Viehmeyer: Launi, Galguera, Kuplast, Castillo, Graham and Morales. Furthermore, Launi's report identifies Graham as the officer responsible for the dog that attacked Mr. Viehmeyer:

> Cpl. Castillo, ***K-9 Ofcr. Graham*** and I confront Viehmeyer at gun point ordering him to stop. At the same time, Inv. Galguera came flying out the same window after Viehmeyer. Viehmeyer didn't comply with our orders. He started to run back toward the front porch. Just prior to him reaching the porch, he was met by Inv. Kuplast who was now exiting the front door. Kuplast began fight with Viehmeyer as he was backed up by Cpl. Morales. We moved in to assist but were ordered back by ***Graham so the K-9*** could be released and used to take Viehmeyer into custody.

Exhibit C, page 21 hereto (emphasis added).

5. Nowhere in these reports is it mentioned that Santa Ana officers J. Quijas (#1974), A. Blascovich (#1800), or M. Gonzalez (#2137) had used force against Mr. Viehmeyer, or were even involved in his arrest.

6. Using Launi's report, the only one describing officers' conduct in arresting Mr. Viehmeyer, I named as defendants the Santa Ana officers Launi, Galguera, Kuplast, Castillo, Graham and Morales. Furthermore, based on this report I thought ***Graham*** was the officer

who ordered the dog to bite Mr. Viehmeyer. As explained in the following paragraphs, unbeknownst to me there were other reports in which officers admit to using force against Mr. Viehmeyer but who are *not* mentioned at all by Launi in his narrative description of Mr. Viehmeyer's arrest

7. In early January 2002, I received from defense counsel previously undisclosed Santa Ana police reports prepared by Blascovich (**Exhibit D**) Gonzalez (**Exhibit E**), and Ruiz (**Exhibit F**). In his report Blascovich admits that inside the bedroom, he hit Mr. Viehmeyer in the face with the but of his rifle, while Gonzalez admits using his flashlight in an effort to strike Mr. Viehmeyer. See **Exhibit D**, page 24 *infra*, and **Exhibit E**, page 26 *infra*. Moreover, contrary to Launi's report (**Exhibit C**), Ruiz's 10 page report says Santa Ana officer Quijas ordered the dog to bite Mr. Viehmeyer. See **Exhibit F**, page 36 *infra*. (Note that this 10 page report by Ruiz is different from the three page Ruiz report attached hereto as **Exhibit B** in that the 10 page report describes Mr. Viehmeyer's arrest whereas the three page report does not.) These reports provided the first information I had identifying the officers who struck Mr. Viehmeyer with a rifle butt and a flashlight inside the bedroom, while also identifying a different officer, Quijas, as the dog handler. Because I did not have any information before January indicating that Quijas, Blascovich and Gonzalez had used force against Mr. Viehmeyer, I prepared and filed, and caused to be served, notices stating that these officers were named as doe defendants. See notices filed January 15, 2002. At the time I prepared and filed the doe notices, I had forgotten that the Court had set a September 2001 cut-off date.

8. Defendants' failure to produce the recent reports violated the parties' discovery agreement made at our May 17, 2001 early meeting. At the meeting we agreed to voluntarily disclose documents identified on the parties' respective Rule 26 initial disclosures but which the other parties did not have, as shown by their Rule 26 initial disclosure. Defense counsel knew the only reports I had were the three page Ruiz report (**Exhibit B**) and the Launi report (**Exhibit C**) as these were the only reports disclosed in plaintiff's Rule 26 initial disclosures served June 13, 2001. Nevertheless, defense counsel did not produce any of the missing Santa Ana reports until January, 2002.

9. Counsel for Santa Ana now contends that their client was not obligated to produce the reports if I did not specifically request them, and since I did not formally request the reports until I served a Rule 34 production demand on November 15, 2001, defense counsel claims there is no violation of the agreement. In effect, counsel is claiming that in our May 17 meeting, we only agreed to do what the federal rules already obligated us to do, *i.e.*, identify documents so the other side could request them. This makes no sense. An agreement was not necessary to trigger the mandatory identification requirements of Rule 26(a)(1)(B). Also, a review of the record shows that defense counsel present claim is incorrect, that instead the parties had agreed to produce the police reports *sua sponte*.

10. At plaintiff's November 15, 2001 deposition, defense counsel Ms. Shen-Urquidez showed Mr. Viehmeyer some police photographs. I immediately spoke up, indicating the photographs had not been produced earlier as they should have been."

> Mr. Cook: Were these [photographs] produced as part of the initial disclosure?
>
> . . .
>
> Ms. Shen-Urquidez: I don't know.
>
> Mr. Cook: I don't think they were, but anyway –
>
> . . .
>
> Ms. Shen-Urquidez: I don't know. I'll double check. If they weren't, you can certainly have a copy. They're just police photos.
>
> * * *
>
> Ms. Shen-Urquidez: . . . *I thought that we sent you a laser copy*, because I had four made and I only have three left.

11/15/01 Viehmeyer depo., 118:8-16, 120:11-12 (**Exhibit G**) (emphasis added).

11. It is significant what Ms. Shen-Urquidez did *not* say. She did not say, as she now does, that there was no obligation to produce the photographs unless I requested them. Nor did defense counsel dispute my statement that the photographs should have been produced earlier *sua sponte*.

12. At various times last year I voluntarily provided documents to defendants even though they had not specifically requested them. I did so because the documents were relevant and non-privileged, and I was obligated to produce them *sua sponte* pursuant to our May 17, 2001 agreement:

A. On June 20, 2001, *sua sponte* my office provided defendants a copy of the EMT report on Mr. Viehmeyer's treatment. See **Exhibit H**.

B. On June 28, 2001, *sua sponte* my office provided scene and injury photographs, along with Western Medical Center records regarding Mr. Viehmeyer's treatment. See **Exhibit I**.

C. On June 29, 2001, *sua sponte* my office provided a copy of a witness' deposition, taken in another case, which I believed relevant to Mr. Viehmeyer's claims. See **Exhibit J**.

D. On September 6, 2001, *sua sponte* my office provided copies of Mr. Viehmeyer's medical records. See **Exhibit K**.

I declare under penalty of perjury that the foregoing is true and correct except as to those matters stated on information and belief and as to those matters I believe them to be true. Executed February 13, 2002, at Los Angeles, California.

/s/ Donald W. Cook
Donald W. Cook